

**BASIC INVESTIGATIVE STANDARDS**  
**MANUAL**  
**FOR DOCUMENTING**  
**INTERNATIONAL CRIMES**  
**IN UKRAINE**



May 2023



Global  
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## **Basic Investigative Standards Manual for Documenting International Crimes in Ukraine**

May 2023

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### **Disclaimer**

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# Who We Are

**Global Rights Compliance (‘GRC’)** is a Hague-based international non-profit organisation committed to enhancing compliance with international law and seeking justice through the innovative application of the law. We specialise in on-the-ground international humanitarian law (‘IHL’), international criminal law and human rights issues in conflict-affected and high-risk areas around the world, working to identify, prevent and mitigate adverse IHL and human rights impacts.

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# LIST OF ABBREVIATIONS

<b>BIS</b>	Basic Investigative Standards for International Crimes
<b>CAT</b>	Convention against Torture
<b>CCU</b>	Criminal Code of Ukraine
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>CoE</b>	Council of Europe
<b>CPC</b>	Criminal Procedure Code of Ukraine
<b>CRC</b>	Convention on the Rights of the Child
<b>Crimea</b>	Autonomous Republic of Crimea
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CRSV</b>	Conflict-related sexual violence
<b>CSOs</b>	Civil society organisations
<b>D/LPR</b>	Donetsk People's Republic and Luhansk People's Republic, collectively
<b>DPR</b>	Donetsk People's Republic
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>HRMMU</b>	UN Human Rights Monitoring Mission in Ukraine
<b>IAC</b>	International armed conflict
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Convention on Civil and Political Rights
<b>ICESCR</b>	International Convention on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>ICL</b>	International criminal law
<b>ICPPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance

<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>IDPs</b>	Internally displaced persons
<b>IHL</b>	International humanitarian law
<b>IHRL</b>	International human rights law
<b>LGBTQI+</b>	Lesbian, gay, bi-sexual, transgender, queer, intersex and people who identify with the broader LGBTQI+ community but use terms of self-identification
<b>LPR</b>	Luhansk People's Republic
<b>NIAC</b>	Non-international armed conflict
<b>OHCHR</b>	United Nations Office of the High Commissioner for Human Rights
<b>OPG</b>	Ukrainian Office of the Prosecutor General
<b>OSINT</b>	Open-source intelligence
<b>OTP</b>	ICC Office of the Prosecutor
<b>POW</b>	Prisoner of war
<b>RFAF</b>	Russian Federation Armed Forces
<b>SOCINT</b>	Social intelligence
<b>UAF</b>	Ukrainian Armed Forces
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNSC</b>	United Nations Security Council
<b>WCD</b>	War Crimes Division



# **PART ONE: INTRODUCTION**

The purpose of this Manual is to familiarise practitioners from civil society organisations ('CSOs') with the international standards relating to the documentation of international crimes within the context of the conflicts that have been occurring in Ukraine since 2014. These standards will be relevant to the documentation of international crimes in Ukraine for the purposes of providing any information collected to the relevant authorities for their use in future domestic or international criminal proceedings, including before the International Criminal Court ('ICC').

The **Basic Investigative Standards for International Crimes ('BIS')** provides a range of minimum standards applicable to an array of documentation activities, including preparing for and conducting documentation activities, doing no harm when interacting with victims and witnesses and understanding the elements of international crimes. It is aimed at supporting the timely and effective documentation of international crimes to achieve the best possible outcomes and to improve access for survivors of conflict-related violence, including sexual violence, to the full range of justice and accountability mechanisms available in Ukraine, in a safe and supportive environment. The BIS is a rights-based tool offering techniques and methodology drawn from domestic and international best practice for the documentation of international crimes. It is a living document, incorporating international human rights standards, and has been tailored, with local input, to the legal, political and social landscape of Ukraine.

## **HOW TO USE THE MANUAL**

To provide practitioners with a comprehensive understanding of the steps necessary to document the international crimes that have been committed in Ukraine, the seven sections of this manual are structured holistically, and fall into three Parts.

- **Part One** contains this introduction and sets out the six essential investigative rules practitioners must adhere to while documenting international crimes.
- **Part Two** provides an overview of international humanitarian law, international human rights law and international criminal law, and sets out the essential aspects of the substantive law related to the international crimes that have been committed in Ukraine (i.e., their contextual, material and mental elements and modes of liability).
- **Part Three** provides guidance on how to prepare for, and conduct, the documentation of international crimes according to international best practice.

Each section is designed as a stand-alone section to guide practitioners through a specific stage of an international crimes documentation process. In this sense, the individual practitioner can extract and/or read alone each section depending on which stage of the documentation process they are at and/or which international crime their work pertains to.

## **Part One:**

**Section One** sets out the six essential investigative rules practitioners must strictly adhere to at all times while documenting international crimes. It is essential that practitioners familiarise themselves with these principles and that they underpin all documentation activities.

## **Part Two:**

**Section Two** provides an overview of international humanitarian law, international human rights law and international criminal law, and how they are applicable to Ukraine. This section will explain which legal regimes are applicable to the various armed conflicts that have taken place – and continue to take place – in Ukraine since 2014.

**Section Three** sets out the substantive law of international crimes applicable in Ukraine in further detail. Thus, Section Three is divided into four broad sections. The first section (Section 3.1) concerns the contextual elements of international crimes and will explain the surrounding context that needs to exist in order to argue that a particular international crime has occurred. The second section (Section 3.2) outlines the material elements of each individual criminal act that may be relevant to the Ukrainian situation according to the Rome Statute and the ICC Elements of Crimes. The third section (Section 3.3) considers the mental elements required for international crimes. The fourth section (Section 3.4) concerns modes of liability and explains the different ways in which a person can be held individual criminally responsible for international crimes. Finally, the fifth section (Section 3.5) outlines how practitioners should analyse and collate the available information in order to demonstrate that international crimes were committed.

## **Part Three:**

**Section Four** provides guidance on preparing for an international crimes documentation process. It outlines the essential preparatory steps practitioners must carry out prior to the commencement of any documentation activities to ensure that all information collected is properly handled and securely stored, in line with international best practice.

**Section Five** concerns the collection and preservation of information. The section begins by introducing information/evidence (Section 5.1) and providing an overview of the admissibility requirements applicable in international criminal proceedings (Section 5.2). Secondly, the section outlines the specific steps practitioners must follow in relation to receiving, recording, handling, preserving and authenticating the different categories of information, including physical information (Section 5.3), documentary information (Section 5.4) and digital or audio-visual information (Section 5.5). A final section outlines the steps required to conduct an open-source investigation (Section 5.6).

**Section Six** highlights best practice for dealing with victims and witnesses of international crimes. The section starts by explaining the overarching general principles of ‘Do not harm’ (Section 6.1), informed consent (Section 6.2), sharing information (Section 6.3), confidentiality (Section 6.4) and referrals (Section 6.5), before going on to discuss principles relating to witness statements and interviews (Section 6.6.).

**Section Seven** examines best practice for documenting conflict-related sexual violence (‘CRSV’). It begins by guiding practitioners on the identification (Section 7.1) and classification of CRSV under both international and domestic Ukrainian law (Section 7.2). The section further considers coercive circumstances (Section 7.3), how to link perpetrators to acts of CRSV (Section 7.4), obtaining and corroborating evidence of CRSV (Section 7.5), understanding victims and the impact of CRSV (Section 7.6) and best practices for documenting CRSV (Section 7.7).

# 1 SIX ESSENTIAL DOCUMENTATION RULES

## 1.1 DO NO HARM

**Ensure, at all times, that your activities do no harm to yourself, victims and witnesses, colleagues and local communities. Under no circumstance should documentation activities be undertaken if you are unable to respect the ‘Do no harm’ principle. If harm arises during a documentation activity, you must cease that activity immediately and seek to remediate any harm done.**

At a minimum, the principle of ‘Do no harm’ involves being aware of the security, privacy, health and other similar concerns of victims and witnesses, as well as taking measures to prevent and mitigate any potential harm they may suffer. Particular attention must be paid to those who are particularly vulnerable, including children and victims of conflict-related sexual violence (‘CRSV’).

The requirement to ‘Do no harm’ should guide all activity, including any decision to enter a crime scene, all collection of information, any engagement with persons associated with an incident or potential witnesses, and all record keeping. For example, practitioners must (where possible) avoid entering a crime scene if it has not been secured by competent authorities.<sup>1</sup>

For more information on conducting a risk assessment and mitigating risks pursuant to the principle of ‘Do no harm’, see Section 6.1.

## 1.2 MAINTAIN MINIMUM STANDARDS

**Always ensure your conduct and the conduct of your colleagues adheres to an explicit set of minimum standards for ethical conduct and professionalism throughout the planning and execution of the documentation process.**

It is recommended that a series of procedures are created to regulate and ensure the activities of all persons working on documenting international crimes adhere to minimum standards concerning ethical conduct and professional behaviour. This should include procedures to ensure that, at a minimum:

- The documentation process is well planned and executed;
- Any decision to enter a crime scene is taken with care and due consideration for the risks;

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<sup>1</sup> For additional guidance, see Section 5.3.1.3, below.

- Any collection of information is timely and followed by adequate record keeping;
- Any engagement with persons relevant to an incident or potential witness is only conducted when relevant risk assessments have been made; and
- The documentation process conducted is verifiable, accurate, independent and impartial. A failure to meet these demands may undermine the viability of future proceedings, and justice as a whole.

### **1.2.1 Record, Collect and Preserve all Information**

**Never disregard or discard any information (both incriminatory and exculpatory) that appears relevant, while continuing to consider all possible outcomes. At the early stages of the documentation process, it is not possible to fully anticipate what might be relevant and probative of an individual's responsibility or guilt. Conclusions cannot be safely reached until all possible information has been gathered.**

Any collection of information must be followed in a timely manner by adequate record keeping to protect its integrity and usability at trial.<sup>2</sup> The preservation of all information requires you to ensure that it is not damaged, does not deteriorate or become contaminated, and is secured for use at trial. As well as being approached objectively, this requires the implementation of a chain of custody for all physical, documentary and digital information (*see* Section 4.2.2).

### **1.2.2 Maintain an Organised System to Record Documentation Steps and Results (Especially a Chain of Custody)**

**Ensure that all information is handled, stored and recorded in accordance with international best practice. The proper collection of information is based on: (i) the implementation of a chain of custody; (ii) preservation of the information; and (iii) accuracy in identification and labelling.<sup>3</sup>**

International best practice requires, at a minimum, a safe and secure storage system, including a comprehensive chain of custody procedure; a documentation kit and folder; a documentation plan; and a risk assessment and strategy. Any departure from the basic principles concerning information collection, handling and preservation risks providing reasons to doubt its integrity or even its exclusion in any future judicial process. Further, record should be kept for the steps taken during the documentation process and the findings, including the reasons for or the context in which the materials are collected, the analytical conclusion, and any other circumstantial information.

At minimum, a chain of custody involves: properly describing the information's source; correctly labelling the information; recording its removal from its place of origin, its storage and movement

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<sup>2</sup> ICRC, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, paras 141, 143-145. The ICRC Guidelines are a more useful tool for State mandated investigative authorities and are focused towards investigations into possible violations of international humanitarian law and the commission of war crimes. However, they may be useful for investigations into other prohibited behaviours such as genocide and crimes against humanity and prove useful for actors other than State authorities. Specifically, Guidelines 7 to 11 deal with standards applicable to criminal investigations in armed conflicts.

<sup>3</sup> ICTY, *'ICTY Manual on Developed Practices'* (UNICRI Publisher 2009), para. 31.

until it is handed over to the relevant authorities, including details of persons who provided, handled and stored the information; and recording the purpose for which the information was handled.<sup>4</sup>

For more information, *see* Sections 4 and 5.

### **1.2.3 Be Aware of Your Own In-house Guidelines**

**Practitioners should implement in-house guidelines to ensure professionalism and minimum standards, which must be adhered to throughout the information gathering/documentation process.**

These should reflect, at a minimum, international best practice, and (where applicable) should take account of the relevant rules under the Ukrainian Criminal Procedure Code ('CPC') and the Criminal Code of Ukraine ('CCU'), if possible. Practitioners should keep these in mind throughout the information gathering processes to ensure the credibility, accuracy and reliability of the information collected. This will provide an on-going measurement of minimum standards and protect you and the integrity of the documentation process from later criticism.

## **1.3 MAINTAIN IMPARTIALITY AND OBJECTIVITY**

**Maintain impartiality and objectivity throughout the documentation process. Your role is not to take sides in a conflict, but to document reliable information pointing to the commission of international crimes by all sides.**

Separate your opinion from where the information leads you. Never assume pieces of information are accurate without verification, and always question your own assumptions. Ensure you do not lead witnesses when conducting interviews and instead ask open-ended questions that allow victims and witnesses to provide their testimony freely.

Impartiality and objectivity during the documentation process are essential to promote justice, to strengthen the legitimacy of your national proceedings,<sup>5</sup> and to combat propaganda and disinformation campaigns.<sup>6</sup>

### **1.3.1 Focus on the Factual Information, Not Law or Opinion**

**The documentation process should be fact-led. Premature assessments of what the information might reveal should be avoided.**

Fact-led documentation activities ensure that the truth of what happened is revealed, rather than a partial view based on the practitioner's preconceived idea of what may have happened. This will provide practitioners with a clear view of what information may eventually constitute evidence and

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<sup>4</sup> F. D'Alessandra et al., 'Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practice (Public International Law & Policy Group ('PILPG') 2016) ('PILPG Handbook'), p. 36.

<sup>5</sup> N. Lubell et al., 'Guidelines on investigating violations of IHL: Law, policy and good practice' (ICRC 2019) ('Lubell et al., 'Guidelines on investigating violations of IHL'), para. 27.

<sup>6</sup> Lubell et al., 'Guidelines on investigating violations of IHL', para. 28.

its precise relevance and probative value. It will protect you and the integrity of the process from any subsequent complaint(s).

## **1.4 KNOW YOUR LIMITS**

**If you believe that you do not have the requisite competence, you should refrain from undertaking the task and seek advice from appropriately qualified personnel.**

This recommendation is especially relevant to activities which require specialist knowledge or training, including entering a crime scene and handling information uncovered at the scene (e.g., ballistic or forensic information), or interviewing children or particularly vulnerable victims/witnesses, including victims of CRSV. Undertaking such activities without the necessary competence can impede the overall documentation of the commission of international crimes, as well as potentially cause harm to yourself, **victims and witnesses, colleagues and local communities.**

## **1.5 OBTAIN INFORMED CONSENT**

**Obtain the informed consent of victims and witnesses prior to any engagement with them.**

This includes, before they are interviewed, photographed, referred to any support services or have their information recorded or shared with third parties.<sup>7</sup> If the victim or witness does not provide informed consent, you **MUST NOT ATTEMPT TO COLLECT INFORMATION FROM THEM AND MUST CEASE ANY ONGOING INTERACTION.** This principle applies to all stages of the documentation process and is an ongoing and minimum requirement.

For more information, *see* Section 6.2.

## **1.6 PROTECT CONFIDENTIALITY OF INFORMATION AND PROTECT WITNESSES AND SOURCES**

### **1.6.1 Confidentiality**

**The principle of confidentiality requires practitioners to protect the information gathered.**

To maintain confidentiality, you must protect not only the information you gather about victims/witnesses throughout all stages of the documentation process, but also protect their privacy.<sup>8</sup> This is an important means of avoiding safety and security risks, secondary and repeat victimisation, intimidation, retribution and retaliation, and stigmatisation.<sup>9</sup>

Nonetheless, there are limits to confidentiality, for example, information collected may need to be provided to domestic or international investigators/prosecutors or courts, which will often also mean

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<sup>7</sup> PILPG Handbook, p. 23.

<sup>8</sup> PILPG Handbook, p. 24.

<sup>9</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, preamble, para. 54, Article 21.

that the information will be subsequently disclosed to any relevant suspect/accused). This should be clearly explained to victims or witnesses at the outset of the documentation activity, and their informed consent to continue with the process should be obtained.<sup>10</sup>

For more information, *see* Section 6.4.

### **1.6.2 Protection**

**The safety and security of victims and witnesses should be at the forefront of your mind throughout the documentation process. As part of the principle to ensure protection of victims and witnesses, risk assessments should be completed and measures to meet the victims medical, psychological or security needs should be implemented.**

Victims and witnesses should be provided with options for assistance and support. There are a number of protective measures available to practitioners, including providing referrals to the necessary experts and support structures, particularly where the victim or witness requires urgent medical or psychological assistance.

For more information, *see* Section 6.1.4.

### **1.6.3 Gender-specific Protection**

**Gender is a social construct which varies within and between societies. Gender “refers to sex characteristic and social constructs and criteria to define maleness and femaleness, including roles, behaviours, activities and attributes”.<sup>11</sup> Adopt a gender perspective throughout your documentation activities to understand the difference between males, females and non-binary individuals in status, power, roles and needs, and the overall impact of gender.<sup>12</sup>**

Not all gendered impacts will be of a sexual nature or be immediately obvious, nonetheless, you should take steps to reveal and explore all gendered impacts of the crime and the conflict. For example, crimes such as enslavement, persecution, deportation or forcible transfer of population, torture, murder or starvation may have a gendered element based upon the specific targeting of women, girls, men, boys and/or non-binary individuals, or because of the differences in status, power, roles and needs of males and females in the specific context.<sup>13</sup>

Be cognisant of the gender-specific protection needs of victims and witnesses of international crimes, including those in the territories temporarily controlled by the Russian Federation. In particular, when interacting with victims and witnesses of CRSV crimes, it is important to watch for signs of trauma and to refer victims and witnesses to appropriate medical and psychological services. Victims of CRSV crimes may also have specific concerns relating to the collection of their testimony.

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<sup>10</sup> PILPG Handbook, pp. 28-29.

<sup>11</sup> ICC Office of the Prosecutor, ‘Policy on the Crime of Gender Persecution’ (December 2022), p. 3.

<sup>12</sup> ICC Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014) (‘ICC Policy Paper on Sexual and Gender-Based Crimes 2014’), p. 1.

<sup>13</sup> *See e.g.*, ICC Policy Paper on Sexual and Gender-Based Crimes 2014, p. 1.



Consider victims' or witnesses' preference for the gender of the interviewer and the location of any interview conducted to ensure a private and safe location where the victim will feel comfortable.

For more information on collecting information about CRSV crimes, *see* Section 7.



## **PART TWO: UNDERSTANDING INTERNATIONAL LAW**

Part Two provides an overview of the substantive international law applicable in Ukraine:

- **Section Two:** provides an overview of international humanitarian law ('IHL'), international human rights law ('IHRL') and international criminal law ('ICL'), with a view to explaining which legal regimes are applicable to the armed conflict in Ukraine.
- **Section Three:** sets out the elements necessary to build an international crimes case, namely the contextual/common elements, the elements of the individual acts, the mental elements and the modes of liability. Focusing on crimes against humanity, war crimes, acts of genocide and the crime of aggression which may have occurred in Ukraine, this section sets out the substantive law contained in the Criminal Code of Ukraine and international law, provides relevant case studies and examples, and contains queries for practitioners and examples of evidence relevant to Ukraine.

## **2 INTRODUCTION TO IHL, IHRL AND ICL**

In November 2013, in response to an announcement by then-Ukrainian President, Victor Yanukovich, on the suspension of trade and association talks with the European Union ('EU') and the decision to revive economic ties with Russia,<sup>14</sup> months of protests (known as 'Euromaidan') broke out and continued into February 2014.<sup>15</sup> Shortly thereafter, Russian forces invaded the Autonomous Republic of Crimea ('Crimea'), sealed it off from mainland Ukraine, blockaded the Ukrainian military units stationed inside and seized Crimean governmental institutions, military objectives and strategic civilian infrastructure.<sup>16</sup> As described below, Russia became the Occupying Power in Crimea by at least 27 February 2014.<sup>17</sup> On 16 March 2014, a referendum (held contrary to the Ukrainian Constitution<sup>18</sup> and with significant electoral irregularities<sup>19</sup>) on the status of Ukraine's Crimean

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<sup>14</sup> 'Ukraine drops EU plans and looks to Russia' (*Aljazeera*, 21 November 2013); 'Ukraine profile – Timeline' (*BBC*, 5 March 2020); Reuters Staff, 'Timeline: Events in Ukraine's political history since 1991' (*Reuters*, 29 March 2019); A. Szeptycki, 'The European Union and the "Euromaidan" in Ukraine' (8th General Conference of the European Consortium for Political Research, University of Glasgow, Glasgow, 3 – 6 September 2014).

<sup>15</sup> I. Traynor, 'Ukraine's bloodiest day: dozens dead as Kiev protesters regain territory from police' (*Guardian*, 21 February 2014); 'Ukraine: Five years after the Maydan protests, justice still not attained for victims' (*Amnesty International*, 19 February 2019); M. Schwartz, 'Who Killed the Kiev Protesters? A 3-D Model Holds the Clues' (*NYT*, 30 May 2018).

<sup>16</sup> P. Sonne, 'Crimea Checkpoints Raise Secession Fears' (*Wall Street Journal*, 28 February 2014); *See also*, TSN YouTube Channel, 'Armed civilians set up checkpoints at the entrance to the Crimea', 27 February 2014 (video of checkpoints); A. Prentice, 'Ukraine leader warns Russia after armed men seize government HQ in Crimea' (*Reuters*, 27 February 2014); 'About 50 armed men in military uniform seize Simferopol Airport in early hours of Friday' (*Interfax Ukraine*, 28 February 2014).

<sup>17</sup> *See* Section 2.1.2.2.2, below, for a discussion of the indicia required to establish a situation of occupation. *See also*, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas Report' (2022), Section 3.2.2.

<sup>18</sup> *See*, Constitution of Ukraine, Law of Ukraine No. 254к/96-BP, 28 June 1996, Article 73. *See also*, Decision of the Constitutional Court of Ukraine in the case referred to pursuant to the constitutional procedure by the Acting President of Ukraine, Head of the Verkhovna Rada of Ukraine and Ukrainian Parliament Commissioner for Human Rights regarding the conformity of the Decree of the Verkhovna Rada of the Autonomous Republic of Crimea on the All-Crimean Referendum with the Constitution of Ukraine (the case on a local referendum in Autonomous Republic of Crimea) No.2-rp/2014 (14 March 2014).

<sup>19</sup> The identified violations include: (i) additional voters lists; (ii) harassment and arbitrary detentions of those protesting the referendum; (iii) harassment and persecution of journalists trying to report violations; (iv) voting at home organised in

Peninsula took place wherein, according to Russia, more than 95% of those participating voted in favour of Crimea's secession from Ukraine.<sup>20</sup> Subsequently, a "Treaty on Accession of the Republic of Crimea to the Russian Federation" was signed on 18 March 2014.<sup>21</sup>

Shortly after the events in Crimea, the situation in eastern Ukraine, specifically in the Donetsk and Luhansk oblasts, began to destabilise when pro-Russian groups initiated protests against the Ukrainian government.<sup>22</sup> From 14 April 2014 in Donetsk and 30 April 2014 in Luhansk, a non-international armed conflict ('NIAC') broke out between Ukraine and the separatist armed groups of the Donetsk People's Republic ('DPR') and Luhansk People's Republic ('LPR') (collectively, the 'D/LPR').<sup>23</sup> Beginning in July 2014, Russian forces directly intervened in the territory of Ukraine when they launched attacks in the Donbas region (e.g., the Battle of Ilovaisk, Debaltseve, etc.).<sup>24</sup> Between April 2014 and the signing of the Minsk-I Agreement on 5 September 2014, the D/LPR seized territory in Donbas and solidified its control over these areas, which remain under their control to this day (the D/LPR gained control over Debaltseve following the signing of the Minsk-II Agreement on 12 February 2015 and Ukraine's withdrawal from the area on 18 February). Due to its overall control of the D/LPR (*see* Section 2.1.2.3.2.2), Russia has been occupying these territories by proxy since 5 September 2014.<sup>25</sup>

On 21 February 2022, Russia officially recognised the independence of the D/LPR and deployed its military forces to both oblasts.<sup>26</sup> Following this, Russia launched a full-scale invasion of Ukraine on 24 February 2022.<sup>27</sup>

Considering this context, this section will provide an overview of the different international legal regimes applicable to the conflict in Ukraine. More specifically, it will address:

- **2.1 International Humanitarian Law:** understanding the classification of armed conflicts, the foundational principles of IHL and IHL violations.

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an impromptu manner; and (v) presence of military groups widely believed to be fully or in part composed of Russians. The UN General Assembly declared that the referendum "had no validity". *See*, United Nations Office of the High Commissioner for Human Rights ('OHCHR'), 'Report on Human Rights Situation in Ukraine' (15 April 2014), para. 6.

<sup>20</sup> *See e.g.*, 'Putin acknowledges Russian military servicemen were in Crimea', (*Russia Times*, 17 April 2014); 'Crimea referendum: Voters 'back Russia union' (BCC, 16 March 2014); A. Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law' (*EJIL*, 16 April 2014); O. Khmelivska, 'Falsifications at the "referendum" in Crimea: dead and Russian souls, carousels and forced choice' (*Tyzhden*, 17 March 2014).

<sup>21</sup> The Treaty was ratified by the federal law of the Russian Federation No. 36-Φ3 'On Ratification of the Treaty Between the Russian Federation and the Republic of Crimea on Accession of the Republic of Crimea to the Russian Federation and the Formation of New Subjects in the Russian Federation', 21 March 2014, adopted on the 349th (extraordinary) session of the Council of the Federation.

<sup>22</sup> *See e.g.*, 'Ukraine profile – Timeline' (*BBC*, 5 March 2020)..

<sup>23</sup> *See*, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas Report' (2022), Section 4.1.2.2.

<sup>24</sup> *See*, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas Report' (2022), Section 4.1.2.3.1.

<sup>25</sup> *See*, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas Report' (2022), Section 4.2.3.

<sup>26</sup> J. Hernandez, 'Why Luhansk and Donetsk are key to understanding the latest escalation in Ukraine' (*NPR*, 22 February 2022); N. Hodge, 'Russia's Federation Council gives consent to Putin on use of Armed Forces abroad, Russian agencies report' (*CNN*, 22 February 2022).

<sup>27</sup> 'Russian Forces Launch Full-Scale Invasion of Ukraine' (*Al Jazeera*, 24 February 2022).

- **2.2 International Human Rights Law:** understanding the IHRL framework, when obligations arise under IHRL, the fundamental protections under IHRL and the difference between IHRL and ICL.
- **2.3 International Criminal Law:** understanding the difference between international and domestic crimes, the investigation and prosecution of international crimes and the investigation and prosecution of the elements of international crimes.

## **2.1 INTERNATIONAL HUMANITARIAN LAW**

IHL, also known as the law of war, is the body of law that seeks to limit the effects of armed conflict for humanitarian purposes.<sup>28</sup> It is only applicable during armed conflicts, including situations of occupation.<sup>29</sup>

### **2.1.1 The IHL Framework**

IHL treaties:

- (i) Regulate how damage or injury may be inflicted on the enemy, i.e., the conduct of hostilities,<sup>30</sup> for example, by banning a range of inhumane methods of neutralising the enemy,<sup>31</sup> and
- (ii) Protect civilians and those no longer participating in the conflict,<sup>32</sup> by prohibiting the deliberate targeting of civilians.<sup>33</sup>

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<sup>28</sup> ICRC, 'What is International Humanitarian Law?', July 2004, p. 1.

<sup>29</sup> IHL's applicability is triggered by the existence of factual circumstances irrespective of any formalities such as a declaration of war. For the criteria to determine the existence of an armed conflict, *see*, M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) ('Sassòli IHL'), pp. 169, 176, 180, 183.

<sup>30</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 ('Hague Regulations 1907'), Section II. *See also*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 ('Additional Protocol I'), Part III.

<sup>31</sup> *See e.g.*, Additional Protocol I, Article 35(2); ICRC, Customary IHL Database, Rule 70.

<sup>32</sup> The four Geneva Conventions ('GC') were adopted in 1949. GC I to III primarily address the treatment of fallen soldiers in various scenarios: conflict in the field ('First Geneva Convention'), conflict at sea ('Second Geneva Convention') and prisoners of war ('Third Geneva Convention'). Fourth Geneva Convention concerns the protection of civilians in time of war. Whilst the GCs are almost exclusively concerned with war between states, Common Article 3 to the four GCs is the only provision applicable to non-international armed conflicts ('NIAC'), protecting persons taking no active part in hostilities. The Geneva Conventions are supplemented by three additional protocols including Additional Protocol I, relating to the protection of victims of international armed conflict, and AP II, relating to the protection of victims in NIACs. *See also*, Melzer IHL, p. 17.

<sup>33</sup> Additional Protocol I, Articles 48, 51(2); Additional Protocol II, Article 13; ICRC, Customary IHL Database, Rule 1.

These two treaty-based branches overlap with, and are supplemented by, a vast body of customary IHL,<sup>34</sup> which is binding on all States regardless of whether they are bound by a treaty obligation to the same effect.<sup>35</sup>

### 2.1.2 Classifying Armed Conflicts

IHL distinguishes between international and non-international armed conflicts. The classification of the conflict must also be established in order to find a person responsible for war crimes under the Rome Statute and Ukrainian criminal law (see Section 3.1.2).

#### 2.1.2.1 *Non-International Armed Conflict*

A non-international armed conflict (‘NIAC’) refers to “*protracted* armed violence between governmental authorities and *organised* armed groups or between such groups within a State”.<sup>36</sup> The applicable IHL includes Common Article 3 to the Geneva Conventions, Additional Protocol II and all relevant customary IHL. To establish the war crimes outlined in Articles 8(2)I and 8(2)(e) of the Rome Statute, a NIAC must exist (see Section 3.1.2).

Two elements must be satisfied to establish that a NIAC exists: (i) the non-state armed group(s) involved in the conflict must be sufficiently **organised**,<sup>37</sup> and (ii) the hostilities must have reached a certain level of **intensity**,<sup>38</sup> which can be established by evaluating the following indicia, among others: the seriousness and frequency of attacks; the type and number of armed forces deployed; the

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<sup>34</sup> As part of their mission to promote IHL, the ICRC maintains a compilation of Customary IHL, condensing the established practices into numerated rules accompanied by commentary. It is taken by this Manual as the main source for customary norms in IHL.

<sup>35</sup> Customary law is a set of rules derived from consistent conduct of States (‘State practice’) acting out of the genuine belief that the law – as opposed to, e.g., courtesy or political advantages – required them to act in that way (‘*opinio juris*’). *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, paras 71-74, 77. See also, Sassòli IHL, p. 46.

<sup>36</sup> *Prosecutor v. Tadić*, IT-94-1, Interlocutory Appeal Decision, 2 October 1995 (‘*Tadić* Interlocutory Appeal Decision’), para. 70; *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997 (‘*Tadić* Trial Judgment’), para. 562; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgment, 3 April 2008 (‘*Haradinaj et al.* Trial Judgment’), para. 37. See also, the Ukrainian Military Manual, which defines a NIAC as “prolonged and intense armed clashes on the territory of the state between government armed forces and organized armed formations or between organized armed formations”: ‘Instructions on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine’, 2018, Section 2, para. 40.

<sup>37</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (‘*Ongwen* Trial Judgment’), para. 2685; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (‘*Ntaganda* Trial Judgment’), paras 704-705; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Trial Judgment, 14 March 2012 (‘*Lubanga* Trial Judgment’), para. 537; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 (‘*Katanga* Trial Judgment’), para. 1186; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 (‘*Bemba* Trial Judgment’), paras 134-136; *Haradinaj et al.* Trial Judgment, para. 60. See, *Prosecutor v. Boškoski and Tarčulovski*, ICTY-04-82-A, Appeal Judgment, 19 May 2010 (‘*Boškoski and Tarčulovski* Appeal Judgment’), paras 19-24; *Prosecutor v. Boškoski and Tarčulovski*, ICTY-04-82-T, Trial Judgment, 10 July 2008 (‘*Boškoski and Tarčulovski* Trial Judgment’), paras 199-203; *Prosecutor v. Limaj et. al.*, IT-03-66-T, Trial Judgment, 30 November 2005 (‘*Limaj et. al.* Trial Judgment’), paras 94-134.

<sup>38</sup> ICRC Commentary of 2020 to Geneva Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) (‘ICRC Commentary to Geneva Convention III (2020)’), Article 3, paras 421, 455; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(f); *Ntaganda* Trial Judgment, para. 703; *Tadić* Trial Judgment, para. 562; *Prosecutor v. Akayesu*, ICTR-96-4-A, Appeal Judgment, 1 June 2001, para. 620; *Prosecutor v. Kordić and Čerkez*, ICTY-95-14/2A, Appeal Judgment, 17 December 2004 (‘*Kordić and Čerkez* Appeal Judgment’), para. 341; *Limaj et. al.* Trial Judgment, para. 84; *Boškoski and Tarčulovski* Trial Judgment, para. 175. See also, *Bemba* Trial Judgment, para. 137; *Katanga* Trial Judgment, para. 1187; *Lubanga* Trial Judgment, paras 534-536, 538.

group's ability to control territory over a period of time; and the effect of the violence on the civilian population.<sup>39</sup>

These requirements distinguish NIACs from situations of internal disturbances and tensions, such as riots or isolated and sporadic acts of violence, which are not subject to IHL.<sup>40</sup> In situations where multiple non-state armed groups are fighting against the government's armed forces at once, the non-state armed groups can, if certain criteria are met, be considered cumulatively for purposes of assessing intensity, i.e., the actions of all the armed groups can be considered together when assessing whether the intensity criterion has been met.<sup>41</sup>

### 2.1.2.2 International Armed Conflict

An international armed conflict ('IAC') occurs when one or more States have recourse to armed force against another State, regardless of the reason or the intensity.<sup>42</sup> The applicable IHL includes all four Geneva Conventions, Additional Protocol I and all relevant customary IHL. In order to establish the war crimes outlined in Articles 8(2)(a) and 8(2)(b) of the Rome Statute, an IAC must exist (*see* Section 3.1.2).

Resort to armed force includes the unilateral use of force by one State against another, even if the latter does not or cannot respond by military means.<sup>43</sup> This includes situations where the "armed forces of one State which are within the territory of another State with the agreement of the receiving

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<sup>39</sup> *Boškoski and Tarčulovski* Appeal Judgment, paras 19-24; *Ntaganda* Trial Judgment, paras. 716-717; *Ongwen* Trial Judgment, para. 2684; *Lubanga* Trial Judgment, para. 538; *Katanga* Trial Judgment, para. 1187; *Bemba* Trial Judgment, para. 137; *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Trial Judgment, 27 September 2016, para. 49; *Prosecutor v. Mrkšić et. al.*, IT-95-13/1-T, Trial Judgment, 27 September 2007, para. 407; *Haradinaj et al.* Trial Judgment, para. 49; RULAC Geneva Academy, 'Non-international armed conflict' (last updated 11 September 2017).

<sup>40</sup> *Haradinaj et al.* Trial Judgment, para. 38; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Confirmation of Charges, 15 June 2009 ('*Bemba* Decision on the Confirmation of Charges'), para. 231; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 ('*Lubanga* Decision on the Confirmation of Charges'), para. 173; *Prosecutor v. Dordević*, ICTY-05-87/1-T, Trial Judgment, 23 February 2011 ('*Dordević* Trial Judgment') para. 1522; *Tadić* Trial Judgment, para. 562; *Haradinaj et al.* Trial Judgment, para. 38; *Lubanga* Trial Judgment, para. 538; *Boškoski and Tarčulovski* Trial Judgment, para. 185.

<sup>41</sup> *See, Katanga* Trial Judgment, paras 1212-1217; *Bemba* Trial Judgment, paras 661-662; ICRC, 'Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting' (17 July 2012). However, *see, contra: Lubanga* Trial Judgment, para. 543: "there were a number of simultaneous armed conflicts in Ituri and in surrounding areas within the DRC, involving various different groups. Some of these armed conflicts, which included the UPC, involved protracted violence".

<sup>42</sup> ICRC Commentary of 2016 to Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) ('ICRC Commentary to Geneva Convention I (2016)'), Article 2, para. 218. *See also, Tadić* Interlocutory Appeal Decision, para. 70: "an armed conflict exists whenever there is resort to armed force between states" (emphasis added); *Ongwen* Trial Judgment, para. 2683; *Katanga* Trial Judgment, para. 1173; *Bemba* Trial Judgment, para. 128. *See also, the* Ukrainian Military of Defence's 'Instructions on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine' of 23 March 2017 ('Ukrainian Military Manual'), which defines an IAC as "any conflict between two or more states with the use of armed forces": "Instructions on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine", 2018, Section 2, para. 33.

<sup>43</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 256, 269, 276; ICRC Commentary of 2017 to Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) ('ICRC Commentary to Geneva Convention II (2017)'), Common Article 2, para. 245; ICRC Commentary to Geneva Convention I (2016), Common Article 2, para. 223.



State,” violate the conditions of that agreement.<sup>44</sup> The use of armed force against another State’s armed forces, territory, civilian population /objects or infrastructure would constitute an IAC.<sup>45</sup>

For a situation to amount to an IAC, there is no requirement that the use of armed force between the States reach a specific level of intensity or duration,<sup>46</sup> nor is there a requisite threshold for casualties or how many members of the armed forces need to participate.<sup>47</sup> As such, the isolated use of armed force by one State against another or unilateral use of armed force without resistance may still amount to an IAC.<sup>48</sup>

An IAC may also exist where the armed confrontation does not involve military personnel, but rather non-military State agencies, such as paramilitary forces or border guards, where they are engaged in armed violence displaying the same characteristics as that involving State armed forces.<sup>49</sup> This could include agents of the State, as long as the use of force was committed by *de jure* or *de facto* organs of the State and not private persons.<sup>50</sup> Situations that are the result of a mistake or an individual’s *ultra vires* acts (i.e., acts taken in excess of one’s power and authority), which are not endorsed by the State, would not amount to an IAC.<sup>51</sup>

Finally, although there is no requirement that the use of armed force reach a certain level of intensity, the triggering act must be of a *hostile* nature “in order to overcome the enemy or force it into submission, to eradicate the threat it represents or force it to change its course of action”.<sup>52</sup> Where a State consents, or explicitly requests, the use of force on its territory by another State, an IAC would not exist provided that the intervention stays within the limits delineated by the consenting State and the consent is not withdrawn.<sup>53</sup> When an IAC is established, IHL and the relevant rights and

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<sup>44</sup> UNGA Res 3314 (XXIX) (14 December 1974), Article 3. *See also*, Res RC/Res.6, Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (11 June 2010).

<sup>45</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 257.

<sup>46</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 269-277. *See also*, *Tadić* Interlocutory Appeal Decision, para. 70; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 (*‘Delalić Trial Judgment’*), para. 184 (see also para. 208); *Katanga* Trial Judgment, para. 1173; *Bemba* Trial Judgment, para. 128. D. Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (OUP, 2012), p. 13; Sassòli *IHL*, p. 170. For an opposing view, according to which an IAC must meet a certain threshold of intensity, see, International Law Association, ‘Final Report on the Meaning of Armed Conflict in International Law’ (2010).

<sup>47</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 269-277; ICRC 2016 Commentary to Geneva Convention I, Common Article 2, paras 236-244 *citing* at fn. 70 - Digest of United States Practice in International Law (1981–1988), Vol. III, 1993, p. 3456 (“Some States, for example, have considered that an international armed conflict triggering the application of the Geneva Conventions had come into existence after the capture of just one member of their armed forces”); ICRC 1958 Commentary to Geneva Convention IV, Common Article 2, pp. 20–21.

<sup>48</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 275-277.

<sup>49</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 259, 261.

<sup>50</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 262; *Bemba* Decision on the Confirmation of Charges, para. 223; *Bemba* Trial Judgment, paras 654–656.

<sup>51</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 274. This analysis, which involves the scope of application of IHL, must be distinguished from the situation of attribution in the context of State responsibility, where the State is responsible for the *ultra vires* acts of its organs. *See*, ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 274.

<sup>52</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 258. *See also*, J. Grignon, ‘The beginning of application of international humanitarian law: A discussion of a few challenges’ (2014) 96 *International Review of the Red Cross* 139, pp. 146-147.

<sup>53</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 292 (*see also*, paras 290-291, 293).

obligations thereunder become applicable on the whole of the territories of the States that are party to the conflict.<sup>54</sup>

#### 2.1.2.2.1 *Internationalising a NIAC*

In addition to the situation described above where an IAC occurs between two or more States, a NIAC may become internationalised if either: (i) another State intervenes in that conflict through its troops (direct intervention); or (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).<sup>55</sup>

First, where a State directly intervenes using their armed forces on the territory of another State in support of one or more non-state armed groups against the local government, the nature of the armed confrontation between the intervening State and the territorial State is international (notwithstanding the fact that a NIAC continues to exist in parallel between the local government and the armed group(s)).<sup>56</sup>

Second, where the non-state armed groups in the NIAC are acting on behalf of (i.e., under the ‘overall control’ of) the intervening State, there will not be parallel non-international and international armed conflicts, but only an IAC between the intervening State (acting through a non-state armed group) and the territorial State.<sup>57</sup> To be considered under a State’s ‘overall control’, the controlling State must have “a role in organising, coordinating or planning the military actions of the [non-state armed] group, in addition to financing, training and equipping or providing operational support to that group”.<sup>58</sup>

#### 2.1.2.2.2 *Occupation*

IACs also include situations of occupation,<sup>59</sup> which occur when territory is placed under the ‘effective control’ of a foreign State’s army and extends only to the territory where such control has been established and can be exercised.<sup>60</sup> This is the case even if the occupation meets no armed resistance

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<sup>54</sup> *Kordić and Čerkez* Appeal Judgment, para. 321; *Tadić* Interlocutory Appeal Decision, para. 70.

<sup>55</sup> *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999 (*Tadić* Appeal Judgment), para. 84; *Ntaganda* Trial Judgment, para. 726; *Ongwen* Trial Judgment, para. 2686; *Lubanga* Trial Judgment, para. 541; *Katanga* Trial Judgment, para. 1177; *Lubanga* Decision on the Confirmation of Charges, para. 209.

<sup>56</sup> ICRC Commentary to Geneva Convention I (2016), para. 264; *Ntaganda* Trial Judgment, para. 726; *Ongwen* Trial Judgment, para. 2686; *Lubanga* Trial Judgment, para. 541; *Katanga* Trial Judgment, para. 1177; *Lubanga* Decision on the Confirmation of Charges, para. 209; *Tadić* Appeal Judgment, para. 84; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Judgment, 29 May 2013, Vol. 3, para. 525; ICRC Commentary to Geneva Convention III (2020), Article 3, para. 438. Note, this only occurs where the State intervenes on the side of the non-State armed forces against the territorial State. Where the State intervenes in support of the territorial State against the non-State armed forces, the conflict remains non-international in character. See also, *Ongwen* Trial Judgment, para. 2686.

<sup>57</sup> ICRC Commentary to Geneva Convention III (2020), Article 3, para. 440. See e.g., *Tadić* Appeal Judgment, para. 84; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 79.

<sup>58</sup> *Tadić* Appeal Judgment, para. 137. See also, *Lubanga* Trial Judgment, para. 541; *Katanga* Trial Judgment, para. 1178; *Bemba* Trial Judgment, para. 130; *Ongwen* Trial Judgment, para. 2687.

<sup>59</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), fn. 34; *Prosecutor v. Gbagbo*, ICC-02/11/01/11, Decision on Confirmation of Charges, 12 June 2014, para. 542; *Lubanga* Decision on the Confirmation of Charges, para. 212; *Tadić* Interlocutory Appeal Decision, para. 70.

<sup>60</sup> Hague Regulations 1907, Article 42; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (*Construction of a Wall* Advisory Opinion), paras 78-79; *Armed Activities on the*

and there is no fighting.<sup>61</sup> ‘Effective control’ will be established if the following three cumulative conditions are met: (i) the foreign State’s armed forces are physically present in a foreign territory without consent; (ii) the local government has been or can be rendered substantially or completely incapable of exerting its powers; and (iii) the foreign State’s forces are able to exercise authority over the territory in lieu of the local government.<sup>62</sup> When *all three* conditions are met, the geographical scope of the application of the law of occupation extends throughout the entire area over which the Occupying Power exercises ‘effective control’.<sup>63</sup>

Justification given by an Occupying Power for its occupation – for example, that it is ‘liberating’ the inhabitants of the occupied territory – does not change the legal classification of the situation as an occupation.<sup>64</sup> Importantly, classifying a territory as ‘occupied’ does not confer sovereignty to the occupier.<sup>65</sup> Indeed, it is “an uncontested principle of international law” that unilateral annexation of an occupied territory by the Occupying Power has no legal validity and is considered null and void.<sup>66</sup>

#### 2.1.2.2.3 *Occupation by Proxy*

In addition to ‘classic’ belligerent occupation, a State can also be considered an Occupying Power in situations in which a territory is controlled by non-state armed forces acting on behalf of, and controlled by, that State (i.e., ‘occupation by proxy’).<sup>67</sup> Occupation by proxy will be established where the foreign State exercises indirect ‘effective control’ over the territory in question by virtue of the

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*Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 (‘*Armed Activities Judgment*’), para. 172; ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 336.

<sup>61</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 318-324, *esp.* paras 318-322. *See also*, ICRC, *Occupation and International Humanitarian Law: Questions and Answers* (ICRC 2004).

<sup>62</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 338, 340. *See also*, Y. Dinstein, *The International Law of Belligerent Occupation* (2nd edn, CUP 2019) (‘Dinstein, *Law of Belligerent Occupation*’), pp. 35-54; E. Benvenisti, *The International Law of Occupation* (2nd ed, OUP 2012), pp. 43-51; ICRC, ‘Occupation and Other Forms of Administration of Foreign Territory’, Expert Meeting Report (2012), pp. 16-35; *Armed Activities Judgment*, para. 173. *See also*, *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2003 (‘*Naletilić & Martinović Trial Judgment*’), para. 217.

<sup>63</sup> ICRC Commentary to Geneva Convention III (2020), Common Article 2, paras 341-343, 348-351.

<sup>64</sup> *See*, Dinstein, *Law of Belligerent Occupation*, pp. 38-39; *Armed Activities Judgment*, para. 173.

<sup>65</sup> *See*, Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill | Nijhoff 2009) (‘Arai-Takahashi, *Law of Occupation*’), p. 42; Dinstein, *Law of Belligerent Occupation*, p. 58 (citing L. Oppenheim, ‘The Legal Relations between an Occupying Power and the Inhabitants’ (1917) 33 *LQR* 363, 364; D. Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) (‘Fleck, *Handbook of IHL*’), p. 273); *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, Judgment, 30 May 2004 (‘*Beit Sourik Village Council Judgment*’), para. 27.

<sup>66</sup> *See*, Fourth Geneva Convention, Article 47; Additional Protocol I, Article 4, para. 172; Y. Sandoz, et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) (‘*Commentary on the Additional Protocols*’), para. 172. *See also*, Dinstein, *Law of Belligerent Occupation*, pp. 59-60; Arai-Takahashi, *Law of Occupation*, p. 44; Fleck, *Handbook of IHL*, p. 273; UNSC Res 662 (9 August 1990) UN Doc S/RES/662 (1990). For example, both the UNSC and the ICJ have held that Israel’s purported unilateral annexation of East Jerusalem (occupied territory) is without any legal effect. *See*, UNSC Res 252 (21 May 1968) UN Doc S/RES/252; UNSC Res 478 UN Doc S/RES/478 (1980) (20 August 1980); *Construction of a Wall Advisory Opinion*, para. 78; Dinstein, *Law of Belligerent Occupation*, p. 23. *See also*, *Beit Sourik Village Council Judgment*, para. 27.

<sup>67</sup> *See e.g.*, ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 363; *Loizidou v. Turkey*, Application No. 15318/89, Judgment, 18 December 1996 (‘*Loizidou v. Turkey Judgment*’), para. 52; *Cyprus v. Turkey*, Application no. 25781/94, Judgment, 10 May 2001, (‘*Cyprus v. Turkey Judgment*’), para. 77; *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeal Judgment, 29 November 2017, para. 322; *Naletilić & Martinović Trial Judgment*, paras 213-214; *Blaškić Trial Judgment*, paras 149-150.



effective control exercised by proxy armed forces.<sup>68</sup> As such, the foreign State would be considered the Occupying Power provided that it exercises ‘overall control’<sup>69</sup> over these proxy armed forces.<sup>70</sup>

### 2.1.2.3 Characterisation of the Armed Conflict in Ukraine

Based on the information collected by GRC as part of its Opinion titled ‘International Law and Defining Russia’s Involvement in Crimea and Donbas’<sup>71</sup> – which discusses the situations in Crimea and Donbas, the law applicable to each and the violations that have occurred between February 2014 and February 2022 – there is evidence to suggest that there have been multiple overlapping armed conflicts in Ukraine since February 2014.<sup>72</sup> These will be discussed in turn below.

#### 2.1.2.3.1 *Crimea – IAC and Occupation*

The situation in Crimea amounted to an IAC by at least 27 February 2014.<sup>73</sup> According to the available information, Russian forces engaged in the hostile use of armed force against Ukraine, which was sufficient to trigger an IAC. It is of no consequence that Ukraine did not or could not mount an armed resistance to Russia’s actions.<sup>74</sup> Accordingly, IHL and the relevant rights and obligations thereunder became applicable on the whole of the territories of Ukraine and Russia at least as of this time. Russia’s unilateral resort to armed force continued and intensified in the period following 27 February 2014.<sup>75</sup>

From 27 February 2014, the evidence suggests that Russia exercised ‘effective control’ over the Crimean Peninsula.<sup>76</sup> First, from at least 27 February 2014 to present day,<sup>77</sup> the RFAF have maintained

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<sup>68</sup> ICRC Commentary to Geneva Convention I (2016), Common Article 2, para. 329; ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 363 (*see generally*, ICRC Commentary to Geneva Convention III (2020), Common Article 2, Occupation by proxy, paras 362-366).

<sup>69</sup> ICRC, ‘Occupation and Other Forms of Administration of Foreign Territory’, Expert Meeting Report (2012); Diakonia IHL Centre, ‘Occupation and IHL’; A. Gilder, ‘Bringing Occupation into the 21st Century: The Effective Implementation of Occupation by Proxy’ (2017) 13 *Utrecht Law Review* 1, pp. 60-81; T. Gal, ‘Unexplored Outcomes of Tadić: Applicability of the Law of Occupation to War by Proxy’ (2014) 12 *Journal of International Criminal Justice* 1, pp. 59-80; R. Bartels, ‘The Classification of Armed Conflicts by International Criminal Courts and Tribunals’ (2020) 20 *International Criminal Law Review* 595, pp. 608-609.

<sup>70</sup> ICRC 2016 Commentary to Geneva Convention I, Common Article 2, para. 329; ICRC Commentary to Geneva Convention III (2020), Common Article 2, para. 363.

<sup>71</sup> GRC, ‘International Law and Defining Russia’s Involvement in Crimea and Donbas’ (2022).

<sup>72</sup> Geneva Academy, Military Occupation of Ukraine; Geneva Academy, Non-International Armed Conflicts in Ukraine; Geneva Academy, International Armed Conflict in Ukraine.

<sup>73</sup> Geneva Academy, Non-International Armed Conflicts in Ukraine.

<sup>74</sup> ICRC Commentary to Geneva Convention III (2020), para. 256; *See also*, GRC, ‘International Law and Defining Russia’s Involvement in Crimea and Donbas’ (2022), Section 3.

<sup>75</sup> GRC, ‘International Law and Defining Russia’s Involvement in Crimea and Donbas’ (2022), Section 3.1.2.

<sup>76</sup> GRC, ‘International Law and Defining Russia’s Involvement in Crimea and Donbas’ (2022), Section 3.2.2.

<sup>77</sup> *See e.g.*, Estonian Foreign Intelligence Service, *International Security and Estonia 2019* (2019) p. 30; Washington Examiner, ‘Russia has tripled military presence in Crimea for ‘possible offensive operations’ against Ukraine, says intel report’ (7 August 2019); UNGA, Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (3 December 2020) UN Doc A/75/L.38/REV.1; European Security and Defence, ‘How Much Has Russia Militarised the Crimea?’ (10 March 2020); UN News, ‘In UN address, Ukraine President denounces Russia’s “aggressive expansionist policies”’ (26 September 2018); Interfax, ‘Ukraine welcomes the adoption by the UN General Assembly of an enhanced resolution on Crimea’ (17 December 2021).

a physical presence in Crimea without Ukraine's consent.<sup>78</sup> Second, from 27 February 2014, and in the days and weeks following, the Ukrainian government lost its ability to exercise its power over Crimea.<sup>79</sup> Third, and finally, Russia assumed a position to exercise its authority over Crimea by at least 27 February 2014, when it sealed off Crimea from mainland Ukraine by seizing control over the major access points to the Peninsula,<sup>80</sup> and its forces took over Crimea's Parliament and Council of Ministers,<sup>81</sup> ensuring the adoption of decisions favourable to Russia, such as the decision to hold a referendum on Crimea's accession to Russia.<sup>82</sup> Further exercise of Russia's authoritative capacity in Crimea is evident from the events that followed, including: Russia's blockade and seizure of Ukraine's key infrastructure in Crimea;<sup>83</sup> the signing,<sup>84</sup> and ratification,<sup>85</sup> of the 'Treaty on Accession', which formalised Russia's *de facto* control over Crimea; and Russia's subsequent integration of Crimea into its national, economic, financial, credit and legal systems.<sup>86</sup>

In sum, having satisfied all indicia of effective control, Russia became the Occupying Power in Crimea by 27 February 2014. Its satisfaction of with this criterion continues to this day.

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<sup>78</sup> See e.g., *Ukraine v. Russia (re Crimea) (dec.)*, Application No. 20958/14, Decision, 16 December 2020 ('*Ukraine v. Russia (re Crimea)*'), paras 32-66; ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities' (14 November 2016), para. 158; Ukrainian MFA, 'Charge d'Affaires of the Russian Federation to Ukraine Andrii Vorobiev summoned to the Ukraine's Foreign Ministry', 27 February 2014; Ukrainian MFA, 'Statement of the Ministry of Foreign Affairs of Ukraine' (11 March 2014).

<sup>79</sup> Interfax.ru, 'Aksyonov, leader of the Russian Unity party, became prime minister of Crimea' (27 February 2014).

<sup>80</sup> *Ukraine v. Russia (re Crimea)*, paras 50, 84.

<sup>81</sup> *Ukraine v. Russia (re Crimea)*, paras 34, 42; OHCHR, 'Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)' (25 September 2017), para. 4 (citing Interview given to the TV channel 'Rossiya' conducted on 17 April 2014 as part of a documentary 'Crimea. The Way Home. Documentary by Andrey Kondrashev'). See also, President of Russia, 'Direct Line with Vladimir Putin' (17 April 2014): "Russia created conditions – with the help of special armed groups and the Armed Forces, I will say it straight"; OHCHR, 'Report on the human rights situation in Ukraine' (15 April 2014), para. 18; H.-J. Zahorka (ed), *The Boris Nemtsov Report in English*, in full length: 'Putin. The War', about the Involvement of Russia in the Eastern Ukraine conflict and the Crimea (European Union Foreign Affairs Journal May 2015) ('The Nemtsov Report'), pp. 11 and 33; M. Kofman, et al., *Lessons from Russia's Operations in Crimea and Eastern Ukraine (RAND Corporation 2017)* ('Kofman, Lessons from Russia's Operations'). pp. 7-9.

<sup>82</sup> *Ukraine v. Russia (re Crimea)*, para. 44 (citing Letter from the Prosecutor General's Office of Ukraine of 28 November 2016 (reference no. 10/4/1-22437-16-746 Ref.-16) [...]).

<sup>83</sup> International Crimes in Crimea: An Assessment of Two and a Half Years of Russian Occupation (IPHR September 2016), para. 32; Interfax, 'About 50 armed men in military uniform seize Simferopol Airport in early hours of Friday' (28 February 2014); UkrInform, 'Armed People Take Under Control Airports In Crimea' (28 February 2014); UNIAN, 'In Crimea, a missile boat of the Russian Black Sea Fleet blocked the exit of Ukrainian border ships' (28 February 2014); KyivPost, 'Gunmen seize Simferopol television station, turn off Channel 5, 1+1, turn on Rossiya 24' (6 March 2014); Economist, 'Edging closer to war' (1 March 2014); UHHRU, 'The Occupation of Crimea: No markings, no names and hiding behind civilians' (2019), p. 20. See also, Testimonies of Maryna Kanalyuk, Assistant of the Commander of Ukrainian Navy, Proceedings in Yanukovich trial on Office of the Prosecutor General Youtube Channel 'Court hearing in the case of accusing Yanukovych of treason' (27 December 2017), 3:00-4:00.

<sup>84</sup> OHCHR, 'Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)' (25 September 2017), para. 26. President of Russia, 'Agreement on the accession of the Republic of Crimea to the Russian Federation signed' (18 March 2014).

<sup>85</sup> *Ukraine v. Russia (re Crimea)*, para. 65.

<sup>86</sup> President of Russia, 'Agreement between the Russian Federation and the Republic of Crimea on the admission of the Republic of Crimea to the Russian Federation and the formation of new subjects within the Russian Federation' (18 March 2014), Article 6.

### 2.1.2.3.2 *Donbas*

#### 2.1.2.3.2.1 *NIAC*

There is clear and convincing evidence that by 14 April 2014 in Donetsk and 30 April 2014 in Luhansk, both criteria required to establish the existence of a NIAC between Ukraine and the non-state armed groups operating in the region (i.e., the D/LPR) had been satisfied, namely: the D/LPR were sufficiently organised, and the hostilities had reached a sufficient level of intensity.<sup>87</sup>

The process during which the groups operating in Donbas formalised into organised armed groups took place over several months, beginning in March or April 2014. While not every indicium of organisation was present in each group from the beginning of the hostilities, the groups developed sufficient structure to operate over time and had significant military capacity, as exhibited by their ability to conduct military operations against the UAF and control territory. At least by the time each of the armed groups satisfied the organisational requirement, the armed groups operated as part of a coalition,<sup>88</sup> and their actions could be considered cumulatively for the purpose of the intensity assessment.<sup>89</sup>

The hostilities in Donbas reached the required level of intensity by at least 14 April 2014 in Donetsk and 30 April 2014 in Luhansk.<sup>90</sup> By this time in Donetsk, what were previously sporadic and isolated acts of violence during protests had transformed into armed clashes.<sup>91</sup> In Luhansk, there were no active hostilities in April. However, the fact that the organised non-state armed groups were able to control territory from 28 April, and that the Ukrainian government conceded it had lost control over the area by 30 April 2014, were determinative factors in assessing that the intensity threshold was fulfilled in Luhansk.<sup>92</sup>

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<sup>87</sup> ICRC Commentary to Geneva Convention III (2020), Article 3, paras 421, 455; Rome Statute, Article 8(2)(f); *Ntaganda* Trial Judgment, para. 703; *Tadić* Trial Judgment, para. 562; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 620; *Kordić and Čerkez* Appeal Judgment, para. 341; *Limaj et. al.* Trial Judgment, para. 84, *Boškoski and Tarčulovski* Trial Judgment, para. 175. See also, *Bemba* Trial Judgment, para. 137; *Katanga* Trial Judgment, para. 1187; *Lubanga* Trial Judgment, para. 534.

<sup>88</sup> In particular, in Donetsk, the following groups were operational as part of the coalition: Girkin's group at least by 12 May 2014, Bezler's Group at least by 14 April 2014, the Patriotic Forces of Donbas (Vostok Battalion) at least by 9 May 2014, and the Oplot Battalion at least by 26 May 2014. See, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.2.2.1.

<sup>89</sup> See also, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.2.2.1.

<sup>90</sup> GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.2.2.2.

<sup>91</sup> See e.g., Y. Pavlik, 'The city from which the war began. The leading role goes to...' (*UHHRU*, 2019), p. 11-14; O. Harbar and others, 'Armed Conflict in Ukraine: Military Support of Illegal Armed Formations 'DPR' and 'LPR' by Russian Federation' (*UHHRU*, 2018), p. 8; *Ukrainska Pravda*, 'In Khartsyzsk, "green men" captured the City Council. "Regional" with them' (13 April 2014); OSCE, 'Latest from the Special Monitoring Mission to Ukraine – based on information received up until 20 April 2014, 20:00 (Kyiv time)' (21 April 2014); Bellingcat, 'Identifying the Separatists Linked to the Downing of MH17' (19 June 2019); RFI, 'Kyiv lost control over Donetsk and Luhansk' (30 April 2014); Order of the President of Ukraine No. 405/2014 'On the decision of the National Security and Defense Council of Ukraine of April 13, 2014 "On urgent measures to overcome the terrorist threat and preserve the territorial integrity of Ukraine"' (14 April 2014); *Ukrainska Pravda*, 'The National Security and Defense Council is launching a large-scale anti-terrorist operation with the involvement of the Armed Forces - Turchynov' (13 April 2014); OHCHR, Report on the human rights situation in Ukraine (15 June 2014); A. Maiorova (ed.), 'Donbas in Flames' (*Prometheus*, 2017), p. 35;

<sup>92</sup> See e.g., *Ukrainska Pravda*, 'Luhansk "under control": The separatists took the Ministry of Internal Affairs and the City Council' (29 April 2014); OSCE, 'Latest from the Special Monitoring Mission to Ukraine - based on information received up

#### 2.1.2.3.2.2 IAC and Occupation by Proxy

The first sufficiently corroborated instance of Russia's direct intervention in the territory of Ukraine occurred on 11 July 2014 when the RFAF shelled Ukrainian forces in Zelenopillya, Luhansk oblast, in support of the D/LPR armed groups.<sup>93</sup> Evidence that Russia directly intervened in Ukraine from 11 July 2014 until 18 February 2015, and later through the deployment of RFAF officers into the D/LPR armed forces is sufficient to establish the existence of an IAC between Russia and Ukraine from 11 July 2014 running in parallel to the NIAC between Ukraine and the D/LPR armed forces.

In addition, considering the full scope and cumulative effect of Russia's contributions to the D/LPR armed groups – including organising, planning and directing their military and political activities and the D/LPR's continued dependency on Russia's military supplies, training and economic assistance – and within the context of Russia's continued territorial aims in Donbas, the evidence establishes Russia's overall control over the D/LPR.<sup>94</sup> As such, from July 2014, the NIAC between the D/LPR armed groups and Ukraine (*see above*) was transformed by the relationship of overall control into an IAC between Russia (through the D/LPR armed forces) and Ukraine.<sup>95</sup>

Moreover, from 5 September 2014 in the territories defined by the Minsk-I Agreement and from 18 February 2015 in the territories defined by the Minsk-II Agreement, Russia occupied these territories by proxy through its overall control over the D/LPR armed groups,<sup>96</sup> who, in turn, exercised 'effective control' over these territories.<sup>97</sup> In particular: (i) between March and April 2014, the D/LPR armed groups established a physical presence in the Donetsk and Luhansk oblasts without Ukraine's consent;<sup>98</sup> (ii) by at least 5 September 2014, Ukraine withdrew to the contact line established pursuant to the Minsk-I Agreement,<sup>99</sup> at which time, Ukraine was incapable of exercising its authority over the

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until 29 April 2014, 19:00 (Kyiv time)' (30 April 2014); Justice for Peace in Donbas, 'Russian spring in Stanytsia Luhanska. Part 1'; OSCE, 'Latest from the Special Monitoring Mission to Ukraine - based on information received up until 29 April 2014, 19:00 (Kyiv time)' (30 April 2014); A. Stanko, 'Capture of Luhansk SSU: How did the war in Luhansk start, and who is responsible for it' (*Hromadske*, 6 April 2017); J. Pavlik, 'Kadiivka: the name has been changed, the occupation continues' (*UHHRU*, 2020), pp. 9-11, 33-34; VoaNews, 'Ukraine Admits It's Losing Control in East' (30 April 2014).

<sup>93</sup> See also, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.2.3.1.2.

<sup>94</sup> See also, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.2.3.2.

<sup>95</sup> See also, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.3.

<sup>96</sup> GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.35.2.3. Occupation by Proxy of Donbas.

<sup>97</sup> See also, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.2.3.

<sup>98</sup> GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.2.3.1. See also, Radio Svoboda, 'Donetsk, which resisted' (13 May 2019); BBC News, 'Bloody massacre in Donetsk: how it was' (14 March 2014); International Crisis Group, 'Peace in Ukraine (III): The Costs of War in Donbas' (2020); OHCHR, Report on the human rights situation in Ukraine (15 May 2014), para. 90; V. Gusarov et al., *Invasion of Ukraine: Chronicle of Russian Aggression* (Bright Star Publishing 2016), p. 16; V. Hrytsyuk et al., *Information and reference materials on the chronology of events in 2014-2019 that took place in the Autonomous Republic of Crimea and during the anti-terrorist operation Joint Forces operation in Eastern Ukraine* (Research Center for Military History of the Ivan Chernyakhovsky National University of Defence of Ukraine 2019), p. 4.

<sup>99</sup> GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.2.3.2.1; See also, OSCE, 'Protocol following the consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine Petro Poroshenko and the initiatives of the President of Russia Vladimir Putin' (5 September 2014); BBC News, 'Ukraine crisis in maps' (18 February 2015); D. Allan, 'The Minsk Conundrum: Western Policy and Russia's War in Eastern Ukraine' (Chatham House 2020); Y. Zakharov (comp), *Violent Crimes Committed During the Armed Conflict in Eastern Ukraine between 2014-2018* (Human Rights Publisher 2018), p. 20; Decision of the Government of Ukraine No. 1085-p 'On the approval of the list of the settlements in the territory of which public authorities temporarily don't exercise the powers, and the list of the settlements which are located on a contact line' (7 November 2014).

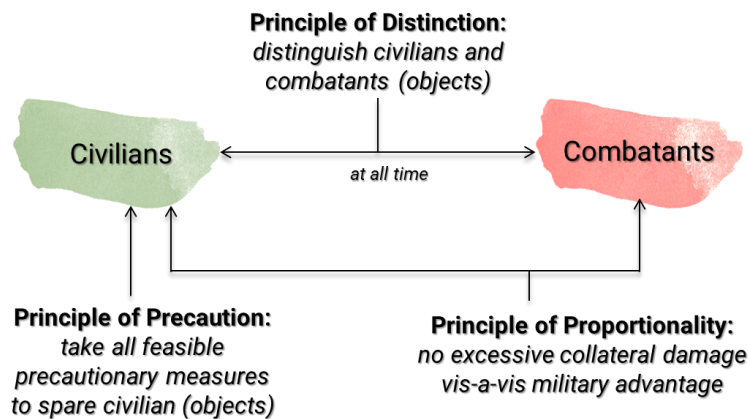
areas defined by the Minsk-I Agreement (and over Debaltseve after 18 February 2015) as demonstrated by its withdrawal of government services and funding from the area;<sup>100</sup> and (iii) by 5 September 2014 (and 18 February 2015 in Debaltseve), the D/LPR unequivocally exercised authority in lieu of the local government.<sup>101</sup>

#### 2.1.2.3.3 *Russian Invasion on 24 February 2022*

Based on the above, Russia's 24 February 2022 invasion into, and subsequent actions in, Ukraine has occurred in the context of the ongoing IAC between Russia and Ukraine that began in 2014. The 2022 invasion saw a dramatic spread of the hostilities across Ukraine into towns beyond the contact line, including Kyiv, Mariupol, Odesa, Chernihiv, Sumy, Kharkiv and additional cities in Donbas.

### 2.1.3 Foundational Principles of IHL

Regardless of the characteristics of the armed conflict (i.e., NIAC or IAC), the principles of distinction, proportionality and precaution are foundational to the application of IHL,<sup>102</sup> and are the cornerstone of many war crimes.<sup>103</sup>



*Figure 1: Foundational Principles of IHL*

Prior to examining these principles, it is necessary to understand the difference between combatants and civilians during armed conflict.

<sup>100</sup> GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.2.3.2.2. See also, Decision of the Government of Ukraine No. 1085-p 'On the approval of the list of the settlements in the territory of which public authorities temporarily don't exercise the powers, and the list of the settlements which are located on a contact line' (7 November 2014); VoaNews, 'Ukraine Admits It's Losing Control in East' (30 April 2014); Council of Europe, Note verbale from the Permanent Representation of Ukraine (5 June 2015); OSCE, 'The package of measures for the implementation of the Minsk agreements, agreed upon by the Trilateral Contact Group' (12 February 2015); N. Melnyk (comp), *Armed conflict in the East of Ukraine: the damage caused to the housing of the civilian population* (Human Rights Publisher 2019), p. 10; A. Maiorova (ed.), *Donbas In Flames* (Prometheus 2017), p. 44; Decision of the Government of Ukraine No. 1085-p 'On the approval of the list of the settlements in the territory of which public authorities temporarily don't exercise the powers, and the list of the settlements which are located on a contact line' (7 November 2014).

<sup>101</sup> GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.2.3.3.

<sup>102</sup> Sassòli *IHL*, pp. 347, 360, 365; ICRC, Customary IHL Database, Rules 1, 7, 14, 15-21.

<sup>103</sup> For example, grave breaches/serious violations under Articles 8(2)(a)/8(2)(c) of the Rome Statute must be committed against protected persons and other war crimes rely on these principles, e.g., Rome Statute, Articles 8(2)(b)(i)/8(2)(e)(i), 8(2)(b)(ii) and 8(2)(b)(ii).



### 2.1.3.1 *Combatants vs. Civilians, Military Objectives vs. Civilian Objects*

IHL makes a fundamental distinction between combatants and civilians/civilian property (i.e., objects).<sup>104</sup>

#### 2.1.3.1.1 *Combatants and Civilians*

In a classic IAC, **combatants** are members of the armed forces of the warring States,<sup>105</sup> or non-military individuals in self-defence groups against invaders.<sup>106</sup> The term ‘combatants’ also includes members of militias or volunteer corps forming part of a State’s armed forces,<sup>107</sup> e.g., the Russian National Guard. It excludes medical and religious personnel,<sup>108</sup> but includes all people working for an armed force, even if their tasks are not directly linked to hostile activities, e.g., production and shipment of weapons, construction of infrastructure, etc.<sup>109</sup> If captured, ‘combatants’ are entitled to prisoner of war (‘POW’) status and are immune from prosecution for lawful participation in hostilities.<sup>110</sup>

Technically, ‘combatant’ status exists only in the context of an IAC. In NIACs, members of the non-state armed groups engaged in hostilities (e.g., members of the D/LPR), sometimes referred to as

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<sup>104</sup> Additional Protocol I, Articles 52 to 56 protect civilian objects by prohibiting attacks against civilian and cultural objects and property, places of worship and objects indispensable to the survival of the civilian population. Also, attacks on work or installations containing dangerous forces that may cause damage to the natural environment and threaten the health or survival of the population are prohibited (*see also*, Additional Protocol II, Articles 14 and 15). Also protected is the right to receive assistance: civilians are entitled to receive food, medical supplies, clothing, bedding and means of shelter. Relief actions are therefore foreseen in Additional Protocol I, Articles 69–70. There is also an extra protection granted to the following categories of civilians: civilian populations in occupied territories (Fourth Geneva Convention, Articles 47–78; Additional Protocol I, Articles 68–71); civilian detainees in occupied territories (Fourth Geneva Convention, Articles 64–78); civilians belonging to a party to the conflict (Additional Protocol I, Articles 72–75); civilian internees (Fourth Geneva Convention, Articles 79–135); foreigners, refugees and stateless persons (Fourth Geneva Convention, Articles 35–46); women and children (Additional Protocol I, Articles 76–78); wounded and sick persons (Fourth Geneva Convention, Articles 13–26; Additional Protocol I, Articles 8–31); medical personnel, installations and means of transportation and relief and humanitarian personnel (Fourth Geneva Convention, Articles 20–23, 59–63; Additional Protocol I, Articles 12, 15, 71).

<sup>105</sup> Third Geneva Convention, Article 4A(1), (2), (3); Additional Protocol I, Article 44(3). For detailed analysis of each subparagraph, *see* Sassòli *IHL*, p. 252; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3<sup>rd</sup> edn, CUP 2016) (‘Dinstein (2016)’), pp. 52–54; ICRC Commentary to Geneva Convention III (2020), para. 1042 regarding Article 4 of the Third Geneva Convention.

<sup>106</sup> Third Geneva Convention, Article 4(A)(6). For detailed analysis, *see*, S. Watts, ‘Who Is a Prisoner of War’ in A. Clapham et al. (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015), p. 907.

<sup>107</sup> Third Geneva Convention, Article 4A(2). For militias or volunteer corps to fall under this provision (i.e., to be considered “members of the armed forces of a Party to the conflict”) they must have been formally incorporated into the armed forces, which is determined by the domestic law of the State in question. *See*, ICRC Commentary to Geneva Convention III (2020), para. 979.

<sup>108</sup> Additional Protocol I, Article 43(2).

<sup>109</sup> ‘Direct participation in hostilities: questions & answers’ (ICRC, 2009).

<sup>110</sup> *See*, Additional Protocol I, Article 44; E. Crawford, *The Treatment of Combatants and Insurgents under the Law of the Armed Conflict* (OUP 2010), p. 52.

‘fighters’,<sup>111</sup> are not entitled to POW status and can be prosecuted for their participation in hostilities.<sup>112</sup> ‘Fighters’ are, however, still entitled to human treatment upon capture.<sup>113</sup>

**Civilians** are everyone else,<sup>114</sup> i.e., anyone who is not a member of: (i) the armed forces; (ii) a militia or volunteer corps of such armed forces; or (iii) an organised group under a command responsible for the conduct of its subordinates, including organised resistance movements and other small armed groups.<sup>115</sup> Civilians enjoy general protection against the dangers arising from hostilities, i.e., they cannot be targeted.<sup>116</sup>

A civilian **directly participating in hostilities** (‘DPH’) temporarily loses their protection under IHL and becomes a lawful target for attack<sup>117</sup> (i.e., the civilian may be directly attacked as if they were a combatant (*see above*)).<sup>118</sup> To determine whether certain conduct amounts to direct participation, the act must: (i) be likely to adversely affect the military operations/capacity of a party to an armed conflict or to inflict death, injury or destruction on protected persons/objects (*see below*); (ii) have a direct causal link to the harm likely to result; and (iii) be specifically designed to directly cause the harm in support of a party to the conflict to the detriment of another.<sup>119</sup>

	Combatant	Fighter	Civilians	Civilians DPH
Hostilities	participate <sup>120</sup>		no right to participate, but retain their civilian status if they do <sup>121</sup>	
	lawful targets <sup>122</sup>		cannot be deliberately targeted <sup>123</sup>	temporarily lose protection and become a lawful target <sup>124</sup>
Captured	POW status <sup>125</sup>	humane treatment <sup>126</sup>	should not have been detained and	can be detained if conditions

<sup>111</sup> See, J.K. Kleffner, ‘From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities: On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference’ (2007) 54 *Netherlands International Law Review* 315, p. 322; J. Pejic, ‘Unlawful/Enemy Combatants: Interpretations and Consequences’ in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Nijhoff 2007), pp. 335-336.

<sup>112</sup> Sassòli *IHL*, p. 277; Dinstein (2016), pp. 45-46.

<sup>113</sup> Common Article 3 to Geneva Conventions; Additional Protocol II, Articles 4 and 5. See, J. Pejic, ‘Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence’ (2005) 87 *International Review of the Red Cross* 375, p. 389; L. Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016), p. 82.

<sup>114</sup> Additional Protocol I, Article 50(1).

<sup>115</sup> Third Geneva Convention, Articles 4A(1)-(3) and (6); AP I, Articles 43(1), 50(1).

<sup>116</sup> Additional Protocol I, Article 50(1).

<sup>117</sup> Additional Protocol I, Article 51(3); N. Mezler, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law’ (ICRC, May 2009) (‘Mezler, ‘Interpretive Guidance’), p. 70.

<sup>118</sup> Mezler, ‘Interpretive Guidance’, p. 20; ICRC, ‘How Does Law Protect in War’.

<sup>119</sup> ICRC, ‘How Does Law Protect in War’; Mezler, ‘Interpretive Guidance’, p. 20.

<sup>120</sup> Additional Protocol I, Articles 43(2) and 48; Mezler, ‘Interpretive Guidance’, p. 27.

<sup>121</sup> Additional Protocol I, Article 51(3).

<sup>122</sup> Additional Protocol I, Article 43(2); Mezler, ‘Interpretive Guidance’, p. 36.

<sup>123</sup> Additional Protocol I, Articles 48 and 51(2).

<sup>124</sup> Additional Protocol I, Article 51(3); Mezler, ‘Interpretive Guidance’, p. 70.

<sup>125</sup> Third Geneva Convention, Article 4(A); AP I, Article 44(1); ICRC, Customary IHL Database, Rule 106.

<sup>126</sup> Common Article 3 to Geneva Conventions; Additional Protocol II, Articles 4 and 5. See also, J. Pejic, ‘Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence’ (2005) 87 *International Review of the Red Cross* 375, p. 389; L. Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016), p. 82.

			must be released <sup>127</sup>	are met <sup>128</sup>
Prosecution for participation?	immune from prosecution, unless they breach IHL <sup>129</sup>	may face prosecution <sup>130</sup>	N/A	may face prosecution <sup>131</sup>

Table 1: Participants in an Armed Conflict

#### 2.1.3.1.2 *Military Objectives and Civilian Objects*

**Military objectives** are limited to “those objects which by their nature, location, purpose or use make an effective contribution to military action *and* whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”.<sup>132</sup> Both criteria must be met simultaneously.<sup>133</sup> In other words, if either of these criteria are *not* met, then the object is civilian.

A **civilian object**, which shall not be made the object of attack, is defined as an object which is not a military objective.<sup>134</sup> Civilian objects temporarily lose their protection for such time as they are classified as military objectives.<sup>135</sup> Consequently, it must be established that the targeted object was not a military objective at the precise time of the attack.<sup>136</sup> If there is any doubt as to the status of a civilian object it should be presumed that this object maintains its civilian status.<sup>137</sup>

Where an object serves both military and civilian functions (i.e., is a **dual-use object**), it may qualify as a military objective and can be legally targeted. Typical dual-use objects are transport systems such as roads, and railways,<sup>138</sup> but can also include, e.g., a power station supplying electricity to a military base and a hospital.<sup>139</sup> However, if the effect on civilian objects and the civilian population exceeds the anticipated military advantage, the attack would violate IHL (*see* the principle of proportionality, below).<sup>140</sup>

<sup>127</sup> Fourth Geneva Convention, Articles 42, 78.

<sup>128</sup> Civilians may only be interned for ‘(imperative) security reasons’. Fourth Geneva Convention, Articles 41-43, 68, 78-135; Additional Protocol I, Article 75. Regarding the thresholds, *see*, L. Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016), p. 42.

<sup>129</sup> E. Crawford, *The Treatment of Combatants and Insurgents under the Law of the Armed Conflict* (OUP 2010), p. 52.

<sup>130</sup> Sassòli IHL, p. 277.

<sup>131</sup> Sassòli IHL, p. 277.

<sup>132</sup> Additional Protocol I, Article 52(2) (emphasis added). *See also*, *Prosecutor v. Radovan Karadžić*, MICT-13-55-A, Appeal Judgment, 20 March 2019, para. 488; *Prosecutor v. Mladić*, IT-09-92-T, Trial Judgment (Vol III), 22 November 2017 (*‘Mladić Trial Judgment (Vol III)’*), para. 3257.

<sup>133</sup> *Commentary on the Additional Protocols*, para. 2018. *See also*, O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 363.

<sup>134</sup> Additional Protocol I, Article 52(1). *See also*, *Mladić Trial Judgment (Vol III)*, para. 3257.

<sup>135</sup> *Katanga Trial Judgment*, para. 893.

<sup>136</sup> *Katanga Trial Judgment*, para. 893.

<sup>137</sup> Additional Protocol I, Art. 52(3); *Prosecutor v. Bahr Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 89, fn. 131.

<sup>138</sup> O. Bring, ‘International Humanitarian Law After Kosovo: Is Lex Lata Sufficient?’ (2002) 71 *Nordic Journal of International Law* 39, p. 42.

<sup>139</sup> H. Shue and D. Wippman, ‘Limiting Attacks on Dual-Uses Facilities Performing Indispensable Civilian Functions’ (2002) 35 *Cornell International Law Journal* 559, pp. 563-566.

<sup>140</sup> Additional Protocol I, Articles 51(5)(b) and 57(2)(a)(iii); ICRC, Customary IHL Database, Rule 14.



### 2.1.3.2 *The Principles of Distinction, Proportionality and Precaution*

The **Principle of Distinction** requires that civilians and civilian objects be distinguished from combatants (or ‘fighters’) and military objectives (*see above*).<sup>141</sup> Attacks may only be directed against the latter.<sup>142</sup> All parties to the conflict must always adhere to this principle. However, the lawfulness of an attack does not depend solely on distinction and must be analysed with the help of the principle of proportionality.

The **Principle of Proportionality** prohibits the launching of an attack against a lawful military target “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.<sup>143</sup> In cases where civilian and non-civilian individuals and/or objects mingle, the legality of an attack will be determined by an assessment of compliance with the proportionality principle.

The **Principle of Precaution** requires that the belligerents take all **feasible** precautionary measures to spare the civilian population, civilians/objects in the course of military operations.<sup>144</sup> Precautions include, among other things, the choice of the means and methods of warfare;<sup>145</sup> the assessment of the effects of the attack;<sup>146</sup> the suspension of an attack;<sup>147</sup> and the provision of effective advance warning.<sup>148</sup>

Feasibility assesses if the measure is “**practicable or practically possible**”, taking into account all the contemporaneous circumstances, including those relevant to the success of a military operation.<sup>149</sup> Such factors include “time, terrain, weather, capabilities, available troops and resources [and] enemy activity”.<sup>150</sup>

If effective, the precautionary measures may change the calculation of proportionality and may render an otherwise impermissible attack lawful. But if the damages cannot be sufficiently mitigated, a party to the conflict must suspend or cancel the attack.<sup>151</sup>

### 2.1.4 IHL Violations

Certain violations of IHL are war crimes.<sup>152</sup> Violations can be perpetrated by a wide range of entities

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<sup>141</sup> Additional Protocol I, Articles 48, 51(2), and 52(2); Additional Protocol II, Article 13(2); ICRC, Customary IHL Database, Rules 1 and 7.

<sup>142</sup> Additional Protocol I, Articles 48, 51(2), and 52(2); Additional Protocol II, Article 13(2); ICRC, Customary IHL Database, Rules 1 and 7.

<sup>143</sup> Additional Protocol I, Article 51(5)(b); ICRC, Customary IHL Database, Rule 14.

<sup>144</sup> Additional Protocol I, Article 57(1).

<sup>145</sup> Additional Protocol I, Article 57(2)(a) (ii); ICRC, Customary IHL Database, Rule 17.

<sup>146</sup> Additional Protocol I, Article 57(2)(a)(iii); ICRC, Customary IHL Database, Rule 18.

<sup>147</sup> Additional Protocol I, Article 57(2)(b); ICRC, Customary IHL Database, Rule 19.

<sup>148</sup> Additional Protocol I, Article 57(2)(c); ICRC, Customary IHL Database, Rule 20.

<sup>149</sup> *Commentary on the Additional Protocols*, para. 2198 regarding AP I, Article 57.

<sup>150</sup> International Law Association Study Group, ‘The Conduct of Hostilities and International Humanitarian Law: Challenges of 21<sup>st</sup> Century Warfare (Final Report)’ (2017) 93 *Stockton Center for the Study of International Law*, p. 38.

<sup>151</sup> Additional Protocol I, Article 57(2)(b); ICRC, Customary IHL Database, Rule 19.

<sup>152</sup> ICRC, Customary IHL Database, Rule 156.

including: military personnel; government members; party officials and administrators; members of organised armed groups; and civilians.<sup>153</sup> IHL violations can be categorised into ‘simple violations’, ‘serious violations’ and ‘grave breaches’ based on the gravity of the offence. Simple violations are sanctioned primarily by the domestic court or court-martial system and the other two are the focus of international criminal courts and tribunals.<sup>154</sup> These are considered in more detail in Section 3.2.

## 2.2 INTERNATIONAL HUMAN RIGHTS LAW

Human rights are granted to all individuals.<sup>155</sup> At their core, human rights are designed to safeguard the dignity of people and their fundamental freedoms, such as the right to life, freedom from torture, the right to freedom of speech, the right to a fair trial and the right to non-discrimination (equality).

In essence, human rights protect the individual from the power of the State. States become obligated to respect the human rights of individuals within their jurisdiction when they ratify international human rights treaties and integrate them into their domestic legislation.<sup>156</sup> The norms that arise from such treaties are collectively referred to as IHRL. IHRL allows the individual to seek redress when a State fails to uphold their rights, thus providing an avenue for victims toward justice and accountability.

During situations of armed conflict and occupation, IHRL remains applicable alongside IHL.<sup>157</sup> This means that IHRL continues to apply throughout the territory of Ukraine, including those territories occupied by Russia (*see* Section 2.2.2).

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<sup>153</sup> See e.g., *United States v. Carl Krauch, et al.*, Judgment, 30 July 1948 (*I.G. Farben Trial*); *United States v. Wilhelm von Leeb, et al.*, Judgment, 27-28 October 1948 (*The High Command Case*); International Military Tribunal (‘IMT’) for the Far East, Judgment, 4 November 1948; IMT, *Trial of the Major War Criminals before the International Criminal Tribunal Volume I – Judgment*, 1 October 1946.

<sup>154</sup> Rome Statute, Article 8; UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (*‘ICTY Statute’*), Article 1; UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (*‘ICTR Statute’*), Article 1; UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (*‘SCSL Statute’*), Article 1(1); UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 (*‘Nuremburg Charter’*), Article 6(b); UN, International Military Tribunal for the Far East Charter (19 January 1946), TIAS 1589 (*‘Tokyo Charter’*), Article 5(b).

<sup>155</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), ETS No.005, *Opened for signature 4 November 1950 entry into force 3 September 1953* (‘ECHR’), Article 1.

<sup>156</sup> Human rights obligations may also be derived from ‘customary international law’, which is not examined in this Chapter as the vast majority of human rights obligations can be derived from well-ratified treaty provisions.

<sup>157</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Rep 1996, p. 226 (*‘Nuclear Weapons Advisory Opinion’*), para. 25. See also, *Construction of a Wall Advisory Opinion*, para. 106; UN Human Rights Committee (‘HRC’), ‘General Comment 29: Article 4: Derogations during a State of Emergency’, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3.

## 2.2.1 IHRL Framework

### 2.2.1.1 *Core International Human Rights Treaties*

The ‘founding documents’ of IHRL are generally seen as the UN Charter and the Universal Declaration of Human Rights (‘UDHR’).<sup>158</sup> Over time, the human rights defined in the UDHR have been further developed and codified in nine ‘core’ international human rights treaties and their optional/additional protocols.<sup>159</sup> These instruments are voluntarily signed/ratified by States<sup>160</sup> who undertake legal obligations to implement the provisions of those instruments, and to report periodically to the respective treaty bodies mandated to monitor State compliance with these obligations.<sup>161</sup>

### 2.2.1.2 *Core Regional Human Rights Treaties*

In addition to the core IHRL treaties, there are also several important regional human rights treaties (and additional protocols). Most relevant for Ukraine is the European Convention on Human Rights (‘ECHR’), and its additional protocols, to which Ukraine is a party.<sup>162</sup> While Russia was a party to the ECHR, on 16 March 2022, Russia was expelled from the Council of Europe (‘CoE’),<sup>163</sup> which means that, from 16 September 2022, Russia will no longer be a High Contracting State Party to the ECHR.<sup>164</sup> Nonetheless, the European Court of Human Rights (‘ECtHR’) will continue to deal with individual and inter-State applications directed against the Russian Federation in relation to alleged violations which occurred up until 16 September 2022 (*see below*).<sup>165</sup>

The ECtHR rules on individual or State applications alleging violations of the rights set out under the ECHR. Ukraine has lodged four inter-State applications against Russia before the ECtHR in relation to its actions in Ukraine since 2014, which are currently pending before the Court.<sup>166</sup>

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<sup>158</sup> OHCHR, ‘Manual on Human Rights Monitoring’ (2011) HR/P/PT/7/Rev1 (‘OHCHR Manual on Human Rights Monitoring’), p. 5.

<sup>159</sup> OHCHR, *The Core International Human Rights Treaties*, p. 6; OHCHR, ‘The Core International Human Rights Instruments and their Monitoring Bodies’ (‘OHCHR, The Core International Human Rights Instruments and their Monitoring Bodies’). Additional protocols often broaden or reinforce the obligations contained within a treaty. They are not standalone agreements, and work in conjunction with the treaty to which they are appended. Among the nine ‘core’ IHRL treaties are the: International Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’); International Covenant on Economic, Social and Cultural Rights (‘ICESCR’); International Covenant on Civil and Political Rights (‘ICCPR’); and Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (‘CAT’).

<sup>160</sup> OHCHR, *The Core International Human Rights Instruments and their Monitoring Bodies*.

<sup>161</sup> All treaties except the Optional Protocol to CAT require periodic reporting. *See*, OHCHR, *The Core International Human Rights Treaties*.

<sup>162</sup> Council of Europe (‘CoE’), *Protocols Amending the Text of the Convention*.

<sup>163</sup> CoE, ‘Russia ceases to be a Party to the European Convention of Human Rights on 16 September 2022’, 23 March 2022.

<sup>164</sup> Committee of Ministers, ‘Resolution CM/Res(2022)3 on the legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe’, 23 March 2022.

<sup>165</sup> CoE, ‘Russia ceases to be a Party to the European Convention of Human Rights on 16 September 2022’, 23 March 2022.

<sup>166</sup> *See, Ukraine v. Russia (re Crimea)*, Application no. 20958/14; *Ukraine and the Netherlands v. Russia*, Application nos. 8019/16, 43800/14 and 28525/20; *Ukraine v. Russia (VIII)*, Application no. 55855/18; and *Ukraine v. Russia (X)*, Application no. 11055/22.

## 2.2.2 When do Obligations Arise Under IHRL?

### 2.2.2.1 *Jurisdiction and Application of IHRL During Armed Conflict*

The primary international legal frameworks that regulate situations of armed conflict are IHL and IHRL. Generally, IHL regulates the obligations of warring parties during armed conflicts, including situations of occupation,<sup>167</sup> while IHRL regulates the responsibility of States towards persons under their jurisdiction in times of peace.<sup>168</sup> Nevertheless, IHL and IHRL apply concurrently during situations of armed conflict and occupation,<sup>169</sup> and States have extraterritorial jurisdiction over violations of IHRL occurring outside of their territory if certain conditions are met.<sup>170</sup> According to the ICJ, IHRL instruments are applicable extraterritorially, particularly in occupied territories (i.e., territories under the effective control of a foreign State).<sup>171</sup> The ECtHR has also confirmed the extraterritorial application of the ECHR on the basis of, *inter alia*, ‘effective control’.<sup>172</sup> In sum, States will have jurisdiction where they exercise effective ‘authority and control’ over an individual (e.g., by placing them in detention)<sup>173</sup> or over a territory (i.e., within their own borders and areas where they exercise *effective control* outside these borders, e.g., as an Occupying Power).<sup>174</sup>

Accordingly, as Occupying Power in ‘effective control’ over Crimea and parts of Donbas, Russia is bound by the human rights obligations enshrined in: (i) the IHRL treaties that it has ratified/acceded to, as they apply extraterritorially in the areas under its effective control; and (ii) the IHRL treaties that have been ratified/acceded to by Ukraine, pursuant to Russia’s IHL obligation to respect the laws in force in occupied territory and the territorial nature of human rights protections.<sup>175</sup>

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<sup>167</sup> Common Article 2 to the Geneva Conventions; ICRC Advisory Service, *What is International Humanitarian Law?* (2004).

<sup>168</sup> See, R. Kold, ‘The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions’ (1998) 38 *International Review of the Red Cross* 409. See also, J.-M. Henckaerts and E. Nohle, ‘Concurrent Application of International Human Rights Law and International Humanitarian Law’ (2007) 1 *Human Rights and International Legal Discourse*.

<sup>169</sup> See e.g., *Nuclear Weapons* Advisory Opinion, para. 25; *Construction of a Wall* Advisory Opinion, para. 106; *Hostages trial*, Law Reports of Trial of War Criminals, Vol. III, UN War Crimes Commission, 1949, London, p. 55; *Armed Activities* Judgment, para. 216.

<sup>170</sup> *Armed Activities* Judgment, para. 216; *Construction of a Wall* Advisory Opinion, paras 107-113.

<sup>171</sup> *Armed Activities* Judgment, para. 216; *Construction of a Wall* Advisory Opinion, paras 107-113.

<sup>172</sup> See e.g., *Loizidou v. Turkey*, Application No. 1531/89, Preliminary Objections Judgment, 23 March 1995 (*Loizidou* Preliminary Objections Judgment), paras 62-64; *Cyprus v. Turkey* Judgment, para. 77; *Ilaşcu and others v. Moldova and Russia*, Application no. 48787/99, Judgment, 8 July 2004 (*Ilaşcu and others* Judgment), paras 330-331; *Jalaloud v. the Netherlands*, Application No. 47708/08, Judgment, 20 November 2014 (*Jalaloud* Judgment), para. 139; *Catan and others v. Moldova and Russia*, Application Nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012 (*Catan and others* Judgment), paras 103-107; *Issa and others v. Turkey*, Application No. 31821/96, Judgment, 16 November 2004 (*Issa and others* Judgment), para. 69. For a different approach on the extraterritorial application of the ECHR, see, *Banković v. Belgium*, Application No. 52207/99, Decision on Admissibility, 12 December 2001, paras 61 and 80; *Ukraine v. Russia (re Crimea)*, paras 315-337.

<sup>173</sup> See e.g., *Jalaloud* Judgment, para. 154; *Öcalan v. Turkey*, Application No. 46221/99, Judgment, 12 May 2005, para. 91; *Issa and others* Judgment, para. 71; HRC, ‘General Comment No. 35 (Article 9): Liberty and Security of Person’ (16 December 2014) CCPR/C/G/35 (‘HRC General Comment No. 35’).

<sup>174</sup> See e.g., *Loizidou v. Turkey* Preliminary Objection, para. 62 *Loizidou v. Turkey* Judgment, paras 52-57; *Cyprus v. Turkey* Judgment, para. 77; *Construction of a Wall* Advisory Opinion para. 112.

<sup>175</sup> See Sections 2.1.2.3.1 and 2.1.2.3.2.

### 2.2.2.2 Derogation and Limitation

In situations where a State is unable to meet its IHRL obligations, it may ‘limit’ or ‘derogate from’ these obligations, thereby modifying the extent to which it may be held responsible for a human rights violation.

During exceptional situations of serious public emergencies (actual or imminent), such as armed conflict, States may derogate from (i.e., suspend) their IHRL obligations under certain treaty provisions to the extent strictly required by the exigencies of that situation.<sup>176</sup> States must notify the other State Parties to the instrument concerned at the time of derogation.<sup>177</sup> However, derogation does not extend to all human rights as there are some ‘non-derogable’ human rights, such as the right to life.<sup>178</sup>

On 5 June 2015, in relation to Crimea and Donbas, Ukraine officially gave notice of its decision to derogate from its obligations under the International Covenant on Civil and Political Rights (‘ICCPR’) and the ECHR,<sup>179</sup> according to which it placed on Russia the full responsibility for respect for IHL and IHRL in the annexed and temporary occupied territories of Ukraine.<sup>180</sup> However, Ukraine’s attempt to derogate from the non-derogable rights enshrined in the ICCPR and ECHR cannot be considered valid. Further, after Ukraine declared a state of emergency and martial law on 23 February 2022,<sup>181</sup> it gave notice of its decision to derogate from certain rights enshrined in the ICCPR and the ECHR for the duration of martial law in relation to the remainder of its territory; however, none of these rights include non-derogable rights.<sup>182</sup> Russia has not (officially) notified its intention to derogate from its

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<sup>176</sup> International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49) 999 UNTS 171 (‘ICCPR’), Article 4; ECHR, Article 15; HRC, ‘CCPR General Comment No. 29, Article 4: Derogations During a State of Emergency’ (31 August 2001) CCPR/C/21/Rev.1/Add.11 (‘HRC General Comment No. 29’), para. 4. *See also*, Constitution of Ukraine, Article 64.

<sup>177</sup> ICCPR, Article 4(1).

<sup>178</sup> ICCPR, Article 4; ECHR, Article 15; Organisation of American States, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123 (‘ACHR’), Article 57; HRC General Comment No. 29, para. 15.

<sup>179</sup> *See*, Declaration of the Verkhovna Rada of Ukraine on Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms; Derogation contained in a Note verbale from the Permanent Representation of Ukraine (5 June 2015), registered at the Secretariat General on 9 June 2015.

<sup>180</sup> Declaration of the Verkhovna Rada of Ukraine on Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, paras 1, 2; Derogation contained in a Note verbale from the Permanent Representation of Ukraine (5 June 2015), registered at the Secretariat General on 9 June 2015, paras 1, 2.

<sup>181</sup> MoJ of Ukraine, ‘Communication Regarding derogation measures’ (29 April 2022). *See also*, OHCHR, ‘Update on the human rights situation in Ukraine Reporting period: 24 February – 26 March’, para. 5.

<sup>182</sup> Ukraine notified the UN Secretary-General of its waiver of obligations under Articles 12, 13, 17, 19, 20, 21, 22, 24 and 25 of the ICCPR; Articles 8, 9, 10, 11 and 14 of the ECHR; Articles 1-3 of the Additional Protocol to the ECHR; and Article 2 of Protocol No. 4 to the ECHR. It also notified of derogation from Articles 3, 8(3), 9, 12, 13, 17, 19, 20, 21 and 24 – 27 of the ICCPR; Articles 4 (paragraph 3), 8, 9, 10, 11, 13, 14, 16 of the ECHR; Articles 1, 2 of the Additional Protocol to the ECHR; and Article 2 of Protocol No. 4 to the ECHR. *See*, Note verbale No. 4132/28-110-17626 of 1 March, amended and replaced with note verbale No. 4132/28-194/600-17988 of 4 March. *See also*, OHCHR, ‘Update on the human rights situation in Ukraine Reporting period: 24 February – 26 March’, para. 5.



human rights obligations in relation to its occupation of Crimea or Donbas, or its recent invasion of Ukraine.<sup>183</sup>

Limitation, on the other hand, refers to the placing of restrictions on human rights, which are rendered lawful because they are necessary to achieve legitimate public aims, such as those relating to, e.g., morality, public order or public safety.<sup>184</sup> The issue of whether a particular limitation is lawful will depend upon whether it satisfies the criteria contained within the ‘limitation clause’ of the relevant human rights instrument, i.e., whether it was: (i) prescribed by law; (ii) implemented in pursuance of a clear and legitimate aim; and (iii) a necessary and proportionate means to achieve that aim.<sup>185</sup>

### 2.2.2.3 Non-State Actors’ Obligations

With regard to IHRL, it is generally accepted that, at a minimum, non-state actors exercising government-like functions or *de facto* control over territory/population “must respect and protect the human rights of individuals and groups”.<sup>186</sup> The D/LPR have exercised *de facto* control over parts of Donbas since 5 September 2014 (and 18 February 2015 in Debaltseve) (see Section 2.1.2.3.2).<sup>187</sup> Accordingly, the D/LPR are required to ensure that they do not violate the human rights of those located in the areas of Donbas under their control, and must also prevent others from breaching IHRL in those areas.<sup>188</sup>

### 2.2.3 Fundamental Protections under IHRL

Certain fundamental human rights protections are common to international and regional human rights treaties and are also guaranteed under the constitution of Ukraine. While these rights will not be elaborated on in this section, they are briefly outlined in the table below.

Core Right	International Human Rights Conventions	European Convention on Human Rights	The Constitution of Ukraine
Right to life	Article 6 ICCPR	Article 2 ECHR	Article 27 of the Ukrainian Constitution

<sup>183</sup> See e.g., CoE, ‘Reservations and Declarations for: Russian Federation’ (between 05/05/1949 and 13/04/2022); M. Milanovic, ‘The Russia-Ukraine War and the European Convention on Human Rights’ (Lieber Institute, 1 March 2022).

<sup>184</sup> ICCPR, Article 12(3), 22.

<sup>185</sup> ICCPR, Article 19(3); HRC General Comment No. 31, para. 6; UN General Assembly, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (7 September 2012) A/67/357, para. 41.

<sup>186</sup> OHCHR, ‘Joint Statement by independent United Nations human rights experts\* on human rights responsibilities of armed non-State actors’, *Press Release* (25 February 2021) (citing Harvard Law School’s Program on International Law and Armed Conflict (‘PILAC’), *Armed non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly*, Briefing Report with Annexes, June 2017 (PILAC found that, between 1948 and 2017, 125 resolutions of the UNSC, 65 resolutions of the UNGA and more than 50 presidential statements of the UNSC dealt with the human rights responsibilities of armed non-State actors)); Geneva Academy, ‘Human Rights Obligations of Armed Non-State Actors’, Annex (the Geneva Academy identified 33 relevant resolutions of the Human Rights Council adopted between 2008 and 2015). See also, J. Hessbruegge, ‘Human Rights Violations Arising from Conduct of Non-State Actors’ (2005) 11 *Buffalo Human Rights Law Review*, pp. 9-10.

<sup>187</sup> See, GRC, ‘International Law and Defining Russia’s Involvement in Crimea and Donbas’ (13 February 2022), Sections 4.2.3 and 4.3.1.1.

<sup>188</sup> See, D. Murray, *Practitioners’ Guide to Human Rights Law in Armed Conflict* (OUP 2016), pp. 18-19.

<b>Right to freedom from torture</b>	Article 7 ICCPR Article 2 CAT	Article 3 ECHR	Article 28 of the Ukrainian Constitution
<b>Right to equality</b>	Article 26 ICCPR Article 2 ICERD Article 2 CEDAW	Article 14 ECHR	Article 24 and 26 of the Ukrainian Constitution
<b>Right to liberty and security of person</b>	Article 9 ICCPR	Article 5 ECHR	Article 29 of the Ukrainian Constitution
<b>Right to freedom of expression</b>	Article 19 ICCPR	Article 10 ECHR	Article 34 of the Ukrainian Constitution
<b>Right to a fair trial</b>	Article 14 ICCPR	Article 6 ECHR	Article 55 of the Ukrainian Constitution

Table 2: Common Fundamental Rights Protections

### 2.2.4 The Difference between IHRL and ICL

IHRL and ICL are two substantively different legal frameworks. IHRL focuses on the responsibility of States (rather than individuals) for actions amounting to violations of human rights. The protections ensured by IHRL apply at all times, including during peacetime,<sup>189</sup> social disturbances, sporadic violence, internal strife<sup>190</sup> and situations of armed conflict.<sup>191</sup>

ICL, on the other hand, focuses on the ‘individual criminal responsibility’ of persons who perpetrate certain criminal acts (i.e., genocide, war crimes, crimes against humanity and the crime of aggression). Unlike IHRL, ICL only applies in specific contexts, which vary between the four substantive crimes. These ‘contextual elements’ will ‘trigger’ the application of ICL and transform what might otherwise be a domestic criminal offence (e.g., murder) into an international crime (e.g., the war crime of wilful killing).<sup>192</sup>

While ICL will apply in certain contexts as a special rule, it does not displace IHRL, which remains applicable as a general, constantly applicable set of rules.<sup>193</sup> This gives rise to the possibility of overlap and interplay between these regimes, both of which must therefore be interpreted harmoniously and concurrently so as to ensure legal certainty and fill any gaps in the legal protection afforded to victims.<sup>194</sup> In cases of conflict between these regimes, special rules (i.e., ICL) will usually apply instead of general ones, albeit only as far as is necessary in order to remedy any inconsistency between them.<sup>195</sup>

<sup>189</sup> OHCHR Manual on Human Rights Monitoring, p. 3.

<sup>190</sup> OHCHR, Manual on Human Rights Monitoring, p. 3.

<sup>191</sup> OHCHR, Manual on Human Rights Monitoring, p. 3.

<sup>192</sup> UN HRC ‘General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) CCPR/C/21/Rev.1/Add.13 (‘HRC General Comment No. 31’), para. 18. *See also*, Rome Statute, Article 8(2)(i).

<sup>193</sup> *Construction of a Wall* Advisory Opinion, para. 106; HRC ‘General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life’ (30 October 2018) CCPR/C/GC/36 (‘HRC General Comment No. 36’), para. 70. *See also*, OHCHR Manual on Human Rights Monitoring, Chapter 5.

<sup>194</sup> *Hassan v. The United Kingdom*, Application No. 29750/09, Judgment, 16 September 2014, paras 35-37, 77, 101.

<sup>195</sup> These considerations also apply to the inter-compatibility of IHRL and IHL. *See*, M. Milanović, ‘The Soleimani Case and the Last Nail in the Lex Specialis Coffin’ (*Opinio Juris*, 13 January 2020); M. Milanović ‘The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law’ in J.D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016), pp. 78-117; M. Milanović ‘The Interplay Between Human Rights and Humanitarian Law’ (*Opinio Juris*, 10 October 2007).

## 2.3 INTERNATIONAL CRIMINAL LAW

ICL is the branch of law that deals with the prosecution of international crimes, which are comprised of the four ‘core’ crimes: (i) war crimes; (ii) crimes against humanity; (iii) genocide; and (iv) aggression.<sup>196</sup>

### 2.3.1 What is the Difference Between International and Domestic Crimes?

Many of the individual acts criminalised under these four international crimes involve acts that may also be criminalised under a State’s domestic criminal law,<sup>197</sup> such as murder, rape or torture.<sup>198</sup> However, despite this commonality, international crimes differ from domestic criminal offences in three primary respects: (i) their contextual element(s); (ii) their international character; and (iii) the inapplicability of certain procedural limitations.

#### 2.3.1.1 *The Contextual Element(s) of International Crimes*

The main distinguishing factor between international and domestic crimes is the context that must exist in order for ICL to apply (*see* Section 3.1). War crimes, for example, can only be committed in the context of an ongoing armed conflict,<sup>199</sup> while crimes against humanity can only be committed as part of a “widespread or systematic attack against a civilian population”.<sup>200</sup> These ‘contextual elements’ ‘trigger’ the application of ICL and transform what might otherwise be a domestic criminal offence (e.g., murder) into an international crime (e.g., the war crime of wilful killing or the crime against humanity of murder).<sup>201</sup>

Context is fundamentally important when prosecuting international crimes as it gives rise to ICL and because it demands an analysis of the context, scale and patterns of violence that make up organised criminality. This, in turn, can form the starting point for assessing responsibility in chains of command to include higher-level perpetrators capable of incurring responsibility for coordinating or facilitating international crimes, notwithstanding their physical or organisational remoteness from the actual perpetration of those crimes (*see* Sections 3.4.3.10 and 3.4.3.11).

### 2.3.2 Investigating and Prosecuting International Crimes

#### 2.3.2.1 *The ICC and Ukraine*

Although neither Russia nor Ukraine have signed the Rome Statute, the ICC has jurisdiction over any war crimes, crimes against humanity and genocide allegedly committed in Ukraine by virtue of two declarations submitted by the Ukrainian government, which invited the ICC Prosecutor to investigate

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<sup>196</sup> Rome Statute, Articles 6 (Genocide), 7 (Crimes against humanity), 8 (War crimes) and 8bis (Crime of aggression).

<sup>197</sup> E. Durkheim, *The Division of Labor in Society* [1893] (New York: The Free Press 1997), p. 60, cited in C. Stahn *Critical Introduction to International Criminal Law* (CUP 2020) (‘Stahn (2020)’), p. 17; R. Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> ed, CUP 2015) (‘Cryer et al. (2015)’), p. 227.

<sup>198</sup> See e.g., Rome Statute, Articles 6-8bis; Stahn (2020) p. 17; Cryer et al. (2015), p. 79.

<sup>199</sup> ICC Elements of Crimes, Article 8.

<sup>200</sup> Rome Statute, Article 7.

<sup>201</sup> Rome Statute, Article 7(1)(a) and Article 8(2)(i); HRC, ‘General Comment No. 31’ (26 May 2004) CCPR/C/21/Rev.1/Add.13, para.18.



violations that allegedly occurred during the Euromaidan protests between 21 November 2013 and 22 February 2014 and violations committed on the territory of Ukraine from 20 February 2014 onwards.<sup>202</sup>

In December 2020, the then-ICC Prosecutor confirmed there were reasonable grounds to proceed with an investigation into the situation in Ukraine.<sup>203</sup> On 2 March 2022, the ICC Prosecutor announced that he had proceeded to open an investigation into the Situation in Ukraine on the basis of referrals received from a number of State parties to the Rome Statute.<sup>204</sup> However, this does not apply to the crime of aggression.<sup>205</sup>

### 2.3.2.2 Complementarity

Although ICL is generally known for its prosecution of high-level perpetrators within international courts and tribunals,<sup>206</sup> international crimes are primarily intended to be prosecuted at the domestic level.<sup>207</sup> Under the Rome Statute, this is reflected in the principle of ‘complementarity’, according to which the ICC is expressly intended to be ‘complementary’ to national criminal jurisdictions,<sup>208</sup> acting only as “a court of last resort” when States Parties are unable or unwilling to investigate and prosecute perpetrators of international crimes over which they have jurisdiction.<sup>209</sup> In relation to Ukraine, complementarity means that, while the ICC has opened an investigation into the crimes committed in Ukraine since 2014, the Ukrainian Office of the Prosecutor General has the primary role to play in investigating and prosecuting perpetrators of the crimes against humanity and war crimes that have been perpetrated throughout the armed conflict.

### 2.3.3 Investigation and Prosecution of the Elements of International Crimes

Regardless of whether they are investigated and prosecuted domestically or internationally, to establish individual criminal responsibility for international crimes, the following core, internationally accepted elements of international crimes must be established beyond a reasonable doubt:<sup>210</sup>

- (i) *the contextual elements of international crimes*: elements that relate to the circumstances in which the crime must be committed, or be part of;

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<sup>202</sup> Declaration Lodged by Ukraine under Article 12(3) of the Statute (9 April 2014) (‘Ukraine First Declaration’); Declaration of the Verkhovna Rada of Ukraine ‘On the Jurisdiction of the International Criminal Court’ (‘Ukraine Second Declaration’). Based on these Declarations, the ICC’s jurisdiction in Ukraine extends to events from 21 November 2013 for an indefinite period and includes prosecutions for any war crime, crime against humanity or genocide falling under the Rome Statute.

<sup>203</sup> ICC, ‘Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine’ (11 December 2020).

<sup>204</sup> ICC, ‘Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 State Parties and the Opening of an Investigation’ (2 March 2022)

<sup>205</sup> Rome Statute, Article 15*bis*.

<sup>206</sup> Cryer et al. (2015), p. 4.

<sup>207</sup> Cryer et al. (2015), pp. 70, 79-82.

<sup>208</sup> Rome Statute, preamble paras 4 and 6, Article 1.

<sup>209</sup> ‘About the ICC’ (ICC). See also, Vanderbilt Law School, ‘International Criminal Court serves as a “court of last resort”’ (6 April 2010).

<sup>210</sup> ICC Elements of Crimes.

- (ii) *the physical elements (actus reus) of the crime*: elements that relate to the conduct of the perpetrator, the consequences of such conduct and the circumstances in which they occurred;
- (iii) *the mental elements (mens rea) of the crime*: elements that relate to the mindset/intent of a perpetrator in committing a crime;<sup>211</sup> and
- (iv) *modes of liability*: principles that relate to the means by which a perpetrator is linked to, and held responsible for, criminal conduct.<sup>212</sup>

These are discussed in detail in the following section.

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<sup>211</sup> See, Rome Statute, Article 6.

<sup>212</sup> Rome Statute, Articles 25, 28; Cryer et al. (2015), p. 353.

### 3 CRITICAL ELEMENTS OF INTERNATIONAL CRIMES

This section is designed to aid practitioners in the documentation of international crimes. This section considers the elements necessary to establish a perpetrator's responsibility for international crimes that may have been committed within the context of the conflict in Ukraine since 2014, including crimes against humanity, war crimes, genocide and the crime of aggression.

The purpose of this section is to enable practitioners to understand the crimes under the Criminal Code of Ukraine ('CCU') (including future potential amendments to the CCU through Draft Bill 7290) in light of international law standards and the practice of the relevant international courts and tribunals, and how the provisions of the CCU can be interpreted in light of these standards.

With a view to assisting practitioners in understanding the various elements of international crimes, this section is divided as follows:

- **3.1 Documenting the Contextual/Common Elements:** explaining the surrounding context that needs to be established to suggest that a crime against humanity, war crime and/or genocide has occurred.
- **3.2 Documenting the Individual Acts:** outlining the material elements of the individual criminal acts considered most relevant to the Ukrainian situation at the time of writing. In particular, this section will consider the individual criminal acts which may amount to: crimes against humanity; war crimes; genocide; and aggression.
- **3.3 Documenting the Mental Elements:** explaining the mental elements that are required for international crimes, whether documenting international crimes under the CCU or the Rome Statute, focusing on intent and knowledge (enumerated in Article 30 of the Rome Statute).
- **3.4 Documenting the Modes of Liability:** explaining the ways in which an individual can be linked to the commission of a crime in order to incur individual criminal responsibility under the CCU or international law standards.
- **3.5 Establishing a Case Theory and Analysing the Evidence:** examining how practitioners should analyse and collate the available information in order to demonstrate that international crimes were actually committed.

This section takes the Rome Statute and the Elements of Crimes of the International Criminal Court ('ICC') – which represent the most recent and widely accepted codification of international crimes – as its starting point. In addition, customary international law, other relevant international treaties (including the Geneva Conventions and their Additional Protocols, the Genocide Convention, and the Convention against Torture), and the law and practice of the ICC and other international courts and tribunals, are examined to aid the interpretation of the elements of crimes set out below.

#### **3.1 DOCUMENTING THE CONTEXTUAL/Common ELEMENTS**

When documenting individual criminal acts, practitioners should be aware of the surrounding context that might suggest that crimes against humanity, war crimes and/or genocide may have occurred. These contextual/common elements are also relevant to international crimes prosecuted

domestically (through Article 438 or 442 of the Criminal Code of Ukraine ('CCU'), or through future amendments made by Draft 7290). Information that establishes the existence of the contextual/common elements behind these types of crimes will be critical as it is these elements that will turn an individual criminal act into an international crime (*see* Section 2.3.1).

Considering the evidence of international crimes to date in Ukraine, this section will focus on the contextual/common elements required to establish crimes against humanity, war crimes and genocide. The following sections contain an explanation of the evidence required to establish the contextual/common elements, along with 'Investigative Cues for Practitioners' and 'Examples of Useful Evidence'. The crime of aggression is considered in its totality in Section 3.2.53.

### **3.1.1 Crimes Against Humanity: Contextual Elements**

For an act to be qualified as a crime against humanity, it must be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".<sup>213</sup> This requirement can be broken down into two constituent parts:

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
2. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Currently, Ukrainian legislation does not criminalise crimes against humanity.<sup>214</sup> However, Draft Bill 7290, if and when it enters into force, will introduce the category of crimes against humanity under Article 442-1 of the CCU. Article 442-1(1) establishes that an act can constitute a crime against humanity if intentionally committed (inflicted) within the framework of a deliberate widespread or systematic attack on a civilian population. According to Note 1 to this provision, an attack on the civilian population is defined as "the commission of any of the acts referred to in this article against the civilian population in pursuance of or in support of a policy of a State or organisation aimed at committing such an attack". This provision broadly reflects the contextual elements of crimes against humanity recognised in the Rome Statute and customary international law.

#### ***3.1.1.1 Contextual Element One: The Conduct was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population***

To satisfy the first contextual element, the following must be demonstrated:

- there was an attack directed against a civilian population;
- this attack was widespread or systematic;

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<sup>213</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7.

<sup>214</sup> Some of the individual crimes which can amount to a crime against humanity in certain contexts (such as murder, rape or enforced disappearance) are contained in the Criminal Code of Ukraine ('CCU') as ordinary crimes. However, these do not currently require the contextual elements of crimes against humanity to be proven (i.e., that the conduct took place as part of a widespread or systematic attack directed against a civilian population).

- the attack was committed pursuant to or in furtherance of a State or organisational policy to commit such an attack; and
- the conduct was committed as part of the attack.

#### 3.1.1.1.1 *There was an Attack Directed Against a Civilian Population*

First, practitioners must seek information showing that there was an attack directed against a civilian population and that the perpetrator's conduct formed a part of this attack.<sup>215</sup> An attack is defined as a course of conduct comprising the multiple commission of acts referred to in Article 7(1) of the Rome Statute (i.e., the acts amounting to crimes against humanity) against a civilian population.<sup>216</sup> Random and isolated acts cannot satisfy this element.<sup>217</sup>

The attack need not be military in nature.<sup>218</sup> Civilians must be the primary target of the attack,<sup>219</sup> as opposed to members of the armed forces or other combatants.<sup>220</sup> A civilian population is defined as non-combatants, i.e., those persons who are not servicemen or servicewomen,<sup>221</sup> including both a State's own nationals as well as the nationals of other States (see Section 2.1.3.1).<sup>222</sup> The presence of non-civilians within a population that is comprised primarily of civilians does not alter that

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<sup>215</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 ('Katanga Trial Judgment'), para. 1124; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 ('Bemba Trial Judgment'), para. 165; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005 ('Blagojević & Jokic Trial Judgment'), para. 541; *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999 ('Tadic Appeal Judgment'), para. 248; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgment, 30 November 2005 ('Limaj et al. Trial Judgment'), para. 181; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002 ('Kunarac Appeal Judgment'), para. 95.

<sup>216</sup> Rome Statute, Article 7(2)(a); *Katanga Trial Judgment*, para. 1101; *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('Ongwen Trial Judgment'), para. 2674; *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on Confirmation of Charge Against Laurent Gbagbo, 12 June 2014 ('Gbagbo Decision on Confirmation of Charges'), para. 209; *Blagojević & Jokic Trial Judgment*, para. 543; *Kunarac Appeal Judgment*, para. 88.

<sup>217</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A A2, Appeal Judgment, 30 March 2021 ('Ntaganda Appeal Judgment'), para. 430; ICTY, *Blagojević & Jokic Trial Judgment*, para. 547; ICTY, *Kunarac Appeal Judgment*, paras 96, 100; ICTY, *Blaskić Appeal Judgment*, para. 101; ICTY, *Limaj et al. Trial Judgment*, para. 190; ICTY, *Kunarac et al. Trial Judgment*, para. 100.

<sup>218</sup> *Katanga Trial Judgment*, para. 1101; *Gbagbo Decision on Confirmation of Charges*, para. 209; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 ('Bemba Decision on Confirmation of Charges'), para. 75; ICC Elements of Crimes, Article 7, Introduction, para. 3.

<sup>219</sup> *Katanga Trial Judgment*, para. 1104; *Ongwen Trial Judgment*, para. 2675; *Bemba Decision on Confirmation of Charges*, para. 76; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002 ('Kunarac et al. Appeal Judgment'), paras 91-92.

<sup>220</sup> *Katanga Trial Judgment*, paras 1102-1105; *Tadić Trial Judgment*, para. 637; *Kunarac et al. Trial Judgment*, para. 425.

<sup>221</sup> *Katanga Trial Judgment*, para. 1102; *Bemba Decision on Confirmation of Charges*, para. 78; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001 ('Kunarac et al. Trial Judgment'), para. 425; *Prosecutor v. Martić*, IT-95-11-A, Appeal Judgment, 8 October 2008, paras 291-302.

<sup>222</sup> *Katanga Trial Judgment*, para. 1103; *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997 ('Tadić Trial Judgment'), para. 635; *Kunarac et al. Trial Judgment*, para. 423. See also, Cryer et al. (2015), p. 241; O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, Commentary'), p. 174.

population's civilian status.<sup>223</sup> Additionally, it does not matter whether the perpetrator simultaneously conducted operations against military objects/personnel.<sup>224</sup>

#### 3.1.1.1.2 *The Attack was Widespread or Systematic*

Second, the practitioner must demonstrate that the attack was either widespread or systematic.<sup>225</sup> It is important to note that, while the widespread or systematic nature of the underlying act may indicate that this element has been satisfied,<sup>226</sup> it is not necessary that the act was itself widespread or systematic. Instead, it is the *attack* against the civilian population taken as a whole which needs to be widespread or systematic.<sup>227</sup> In other words, a single act of rape or murder may be a crime against humanity if it was committed as part of a widespread or systematic attack.<sup>228</sup>

##### 3.1.1.1.2.1 *Widespread*

Whether an attack was widespread will depend upon its large-scale nature and the number of persons targeted.<sup>229</sup> In assessing the widespread nature of an attack, the following factors may be relevant:<sup>230</sup>

- (i) the number of criminal acts committed during the attack;
- (ii) the logistics and resources involved in the attack;

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<sup>223</sup> *Katanga Trial Judgment*, para. 1105; *Ongwen Trial Judgment*, para. 2675; *Prosecutor v. Jelisić*, IT-95-10-T, Trial Judgment, 14 December 1999 ('*Jelisić Trial Judgment*'), para. 54; *Tadić Trial Judgment*, paras 638-639; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 ('*Akayesu Trial Judgment*'), para. 582; *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999 ('*Kayishema et al. Trial Judgment*'), para. 128.

<sup>224</sup> *Ntaganda Appeal Judgment*, para. 435.

<sup>225</sup> *Ongwen Trial Judgment*, para. 2680; *Akayesu Trial Judgment*, para. 579; *Prosecutor v. Alfred Musema*, ICTR-96-13-A, Judgment and Sentence, 27 January 2000, para. 203; *Bemba Decision on Confirmation of Charges*, para. 82; *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 ('*Situation in the Republic of Kenya Investigation Authorisation Decision*'), para. 94.

<sup>226</sup> *Prosecutor v. Brđanin*, IT-99-36-A, Appeal Judgment, 3 April 2007 ('*Brđanin Appeal Judgment*'), para. 257; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004 ('*Brđanin Trial Judgment*'), para. 159; *Kordić & Čerkez Appeal Judgment*, para. 94; *Blaškić Appeal Judgment*, para. 101; *Kunarac et al. Appeal Judgment*, para. 94.

<sup>227</sup> See Rome Statute, Article 7(2)(a): "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack". See also, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Appeal Judgment, 7 July 2006 ('*Gacumbitsi Appeal Judgment*'), para. 102; *Kunarac et al. Appeal Judgment*, para. 96; *Kordić & Čerkez Appeal Judgment*, para. 94; *Limaj et al. Trial Judgment*, para. 189.

<sup>228</sup> S. Ferro Ribeiro and D. van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, 2<sup>nd</sup> Edition, (UK Foreign & Commonwealth Office, 2017), p. 45.

<sup>229</sup> See e.g., *Bemba Trial Judgment*, para. 163; *Katanga Trial Judgment*, para. 1123; *Gbagbo Decision on Confirmation of Charges*, para. 222; *Prosecutor v. Harun & Ali Kushayb*, ICC-02/05-01/07, Decision on the Prosecution Application under 58(7) of the Statute, 27 April 2007, para. 62; *Ongwen Trial Judgment*, para. 2681; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 ('*Ntaganda Trial Judgment*'), para. 691; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004 ('*Kordić & Čerkez Appeal Judgment*'), para. 94; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005 ('*Blagojević & Jokić Trial Judgment*'), paras 545-546.

<sup>230</sup> *Ongwen Trial Judgment*, para. 2681; *Bemba Trial Judgment*, para. 163; *Situation in the Republic of Kenya Investigation Authorisation Decision*, para. 224; *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al Bashir, 4 March 2009 ('*Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest*'), para. 81; *Akayesu Trial Judgment*, para. 173; *Prosecutor v. Semanza*, ICTR-97-2, Appeal Judgment, 20 May 2005 ('*Semanza Appeal Judgment*'), paras 268-269; *Kunarac et al. Appeal Judgment*, para. 98.



- (iii) the number of victims;
- (iv) the temporal and geographic scope of the attack;
- (v) the alteration of the ethnic, religious, racial or political composition of the overall population; or
- (vi) the cumulative effect of the attack on the population.

Although there is no fixed minimum threshold in this regard, the ICC Prosecutor has previously considered that low-intensity, sporadic attacks that were limited in geographical scope, and that resulted in fewer than 100 deaths and 500 assaults might not be considered widespread.<sup>231</sup> On the other hand, an attack that resulted in the deaths of around 1,200 civilians over a large geographic area would easily constitute a widespread attack.<sup>232</sup>

#### 3.1.1.1.2.2 *Systematic*

Whether an attack was systematic will depend upon whether it consisted of organised acts of violence, rather than spontaneous or random criminal acts.<sup>233</sup> It may include an organised plan that follows a regular pattern resulting in the continuous commission of acts or the non-accidental repetition of acts.<sup>234</sup> For instance, the targeting of a particular ethnic group with an established methodology would point to the systematic nature of an attack.<sup>235</sup> Factors to consider in determining whether an attack was systematic include:<sup>236</sup>

- (i) the existence of a pattern of criminal conduct;
- (ii) temporally and geographically repeated and coordinated attacks;
- (iii) the involvement of political or military authorities in the attack;
- (iv) the existence of a plan or policy targeting a civilian population;
- (v) the means and methods used during the attack; and
- (vi) the adoption and institutionalisation of discriminatory procedures against a civilian population.

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<sup>231</sup> ICC OTP, 'Report on Preliminary Examination Activities (2015)' (12 November 2015), paras 96-100, 301, 307.

<sup>232</sup> *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 ('*Katanga & Chui* Decision on the Confirmation of Charges'), paras 410-412.

<sup>233</sup> *Katanga* Trial Judgment, para. 1123; *Ongwen* Trial Judgment, para. 2682; *Ntaganda* Trial Judgment, para. 692; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the confirmation of charges, 23 January 2012 ('*Ruto et al.* Decision on the confirmation of charges'), para. 179; *Kordić & Čerkez* Appeal Judgment, para. 94; *Blagojević & Jokić* Trial Judgment paras 545-546. See also, *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000, para. 658; *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 135; *Kunarac et al.* Trial Judgment, para. 429; *Kunarac et al.* Appeal Judgment, para. 94; *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgment, 29 July 2004 ('*Blaškić* Appeal Judgment'), para. 101.

<sup>234</sup> *Katanga* Trial Judgment, para. 1162; *Kordić & Čerkez* Appeal Judgment, para. 94; *Blaškić* Appeal Judgment, para. 101; *Kunarac et al.* Appeal Judgment, para. 94.

<sup>235</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014 ('*Ntaganda* Decision on Confirmation of Charges'), para. 24.

<sup>236</sup> *Gbagbo* Decision on Confirmation of Charges, paras 223-224; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest, paras 79-85; *Ruto et al.* Decision on the confirmation of charges, paras 1699, 181-182; *Akayesu* Trial Judgment, para. 173; *Prosecutor v. Semanza*, ICTR-97-20-A, Appeal Judgment, 20 May 2005, paras 268-269; *Kunarac et al.* Appeal Judgment, para. 98.

### 3.1.1.1.3 The Attack was Committed Pursuant to or in Furtherance of a State or Organisational Policy to Commit such an Attack

Third, practitioners must seek information to establish that the attack was committed pursuant to, or in furtherance of, a State or organisational policy to commit such an attack.<sup>237</sup> The information should establish that the attack was deliberately committed by a State or organisation in furtherance of a policy, as opposed to being spontaneous, random or isolated in character.<sup>238</sup>

Factors that might demonstrate the existence of a State or organisational policy to commit an attack may include:<sup>239</sup>

- (i) the identification and designation of victims by the accused prior to the attack;
- (ii) the preparation or mobilisation of the armed forces prior to the attack;
- (iii) the allocation of substantial resources in preparation for the attack;
- (iv) public statements made prior to the attack;
- (v) meetings among high-ranking officials of a State or organisation prior to the attack were discussions of a military nature (e.g., logistics and strategy) took place;
- (vi) the appointment of commanders responsible for the attack; and
- (vii) the recurrence of similar attacks.

### 3.1.1.1.4 The Individual Conduct was Committed as Part of the Attack

Finally, practitioners should seek information demonstrating that the individual criminal act (e.g., murder, torture, etc.) was committed within the context of (or as part of) the attack directed against the civilian population. The conduct must also be similar to other acts committed during that attack.<sup>240</sup> Consideration should be given to the characteristics, aims, nature and consequences of the acts concerned.<sup>241</sup> In other words, the act in question must not be isolated criminal conduct that “clearly differ[s]” from the other constituent acts of the attack.<sup>242</sup>

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<sup>237</sup> Note that this element was not required by the ICTY or ICTR. However, the Rome Statute provides for this element in Article 7(2)(a). Draft Bill 7290 follows the Rome Statute and requires an attack which is in “pursuance of or in support of a policy of a State or organisation aimed at committing such an attack”: Draft Bill 7290, Article 442-1.1, Note 1.

<sup>238</sup> *Katanga* Trial Judgment, para. 1113; *Bemba* Trial Judgment, para. 161; *Ongwen* Trial Judgment, para. 2678; *Gbagbo* Decision on Confirmation of Charges, para. 215; *Bemba* Decision on Confirmation of Charges, para. 81.

<sup>239</sup> *Katanga* Trial Judgment, para. 1199; *Ongwen* Trial Judgment, para. 2679; *Ntaganda* Trial Judgment, para. 674; *Ruto et al.* Decision on the Confirmation of Charges, para. 219; *Ntaganda* Decision on Confirmation of Charges, paras 19-20; *Prosecutor v. Al-Hassan*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, 13 November 2019, para. 154; *Gbagbo* Decision on Confirmation of Charges, para. 218.

<sup>240</sup> *Katanga* Trial Judgment, para. 1124; *Bemba* Trial Judgment, para. 165.

<sup>241</sup> *Ongwen* Trial Judgment, para. 2688; *Ntaganda* Trial Judgment, para. 696; *Katanga* Trial Judgment, para. 1124; *Bemba* Trial Judgment, para. 165; *Blagojević & Jokić* Trial Judgment, para. 547; *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Judgment, 15 May 2003 (*Semanza* Trial Judgment), para. 326.

<sup>242</sup> *Katanga* Trial Judgment, para. 1124; *Bemba* Trial Judgment, para. 165; *Kunarac et al.* Appeal Judgment, para. 100.

### 3.1.1.2 Contextual Element Two: The Perpetrator Knew that the Conduct was Part of or Intended the Conduct to be Part of a Widespread or Systematic Attack Directed Against a Civilian Population

The second contextual element of crimes against humanity requires practitioners to seek information that the perpetrator was aware that a widespread or systematic attack directed against a civilian population was taking place and that their action was part of that attack.<sup>243</sup> To establish this, there must be proof that the perpetrator knowingly participated in the attack.<sup>244</sup> That said, practitioners need not establish that the perpetrator had knowledge of all of the characteristics of the attack, nor the precise details of the plan or policy of the State or organisation.<sup>245</sup> Moreover, the perpetrator's motive is irrelevant; it is not necessary to show that the perpetrator subscribed to the State's or organisation's criminal designs or intended their act to form a part of the attack.<sup>246</sup> It is sufficient that the perpetrator knowingly participated in the attack, i.e., that they knew that their actions were part of an attack on a civilian population.<sup>247</sup>

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence demonstrate that there was an attack directed against a civilian population?</b>	<ul style="list-style-type: none"> <li>Was there an attack involving the commission of multiple acts constituting crimes against humanity and/or other acts of a comparable severity?</li> <li>Did the attack involve any form of violence?</li> <li>Was the attack military in nature?</li> <li>Was the attack directed against civilians?</li> <li>Were civilians the primary target of the attack?</li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony describing that they heard gunfire for several days in a row in Mariupol and attempted to flee with their parents, and that a Russian soldier fired machine guns at their car, killing their parents.</li> <li>A UN report recording multiple allegations that a member of the armed forces moved from house to house in search of civilian men whom they then attacked and killed.</li> <li>A report detailing that certain individuals were targeted (i.e., soldiers went door to door in search for "nazis" or "banderovtsy," which are derogatory terms often used to describe supporters of the Ukrainian government). Forensic ballistics evidence showing that missiles were fired at a civilian residential building in Kharkiv.</li> <li>A video recording of a violent attack carried out by the perpetrators against civilians in Bucha.</li> </ul>

<sup>243</sup> *Bemba* Trial Judgment, para. 167; *Katanga* Trial Judgment, para. 1123; *Bemba* Decision on Confirmation of Charges, para. 88; *Kunarac et al.* Appeal Judgment, para. 102; *Prosecutor v. Mrkšić & Šljivančanin*, IT-95-13/1-A, Appeal Judgment, 5 May 2009 ('*Mrkšić & Šljivančanin* Appeal Judgment'), para. 41; *Blagojević & Jokić* Trial Judgment, para. 547; *Limaj et al.* Trial Judgment, para. 190; *Kunarac et al.* Trial Judgment, para. 100.

<sup>244</sup> *Katanga* Trial Judgment, para. 1125; *Blagojević & Jokić* Trial Judgment, para. 548; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Judgment, 26 February 2009 ('*Milutinović et al.* Trial Judgment'), para. 158; *Semanza* Trial Judgment, para. 332; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Judgment, 7 June 2001 ('*Bagilishema* Trial Judgment'), para. 94.

<sup>245</sup> *Katanga* Trial Judgment, para. 1125; *Ongwen* Trial Judgment, para. 2691.

<sup>246</sup> *Katanga* Trial Judgment, para. 1125.

<sup>247</sup> *Katanga* Trial Judgment para. 1125; *Bemba* Trial Judgment, para. 167.

		<ul style="list-style-type: none"> <li>• NGO reports indicating that the members of the armed forces had engaged in pillage, rape and murder against civilians.</li> </ul>
<b>Does the evidence demonstrate that the attack was widespread?</b>	<ul style="list-style-type: none"> <li>• How many criminal acts were committed during the attack?</li> <li>• What was the geographical scope of the attack?</li> <li>• For how long did the attack last?</li> <li>• What was the number of victims of the attack?</li> <li>• What was the cumulative effect of the attack on the victims?</li> </ul>	<ul style="list-style-type: none"> <li>• The testimony of several witnesses describing the effect of attacks conducted in Kharkiv over a number of weeks.</li> <li>• Open-source documentation mapping destruction of civilian building across Ukrainian territory.</li> <li>• Official military documents containing plans for multiple attacks to take place simultaneously against several different locations in Ukraine.</li> <li>• Crime scene examinations showing shelling across Kherson in residential areas.</li> <li>• Satellite images revealing a 45-foot trench mass grave in Bucha.</li> <li>• UN reports providing estimates of the high number of civilian deaths, injuries and displacements following the occupation of towns in Kyiv region, which lasted several months.</li> </ul>
<b>OR Does the evidence demonstrate that the attack was systematic?</b>	<ul style="list-style-type: none"> <li>• Did the acts of violence share a similar pattern?</li> <li>• Was the attack carried out in a coordinated and organised fashion?</li> <li>• Were military or political authorities involved in the planning or execution of the attack (deploying substantial resources to effectuate it)?</li> <li>• What means and methods were used to carry out the attack? Do the means and methods used during the attack point to the fact that the attack was planned?</li> </ul>	<ul style="list-style-type: none"> <li>• The testimony of a number of victims across different towns in Kyiv region describing the coordinated takeover, occupation and attacks committed.</li> <li>• UN reports describing a pattern of the use of explosive weapons in a coordinated fashion across various cities such as Mariupol, Luhansk, Kremenichuk and Vinnytsia.</li> <li>• Official military documents containing plans to launch coordinated attacks against several localities.</li> <li>• A report describing how a range of discriminatory policies were introduced in occupied regions, including a pattern of enforced disappearances and transfer of civilians.</li> <li>• Policy documents showing a recent purchase of weapons and equipment used to carry out the attack.</li> </ul>
<b>Does the evidence demonstrate that the attack was</b>	<ul style="list-style-type: none"> <li>• Who planned, directed or organised the attack?</li> <li>• Were any military or political authorities involved in the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• A video recording of a national address given by a Head of State declaring that they had commanded the armed forces to invade a neighbouring State.</li> </ul>

<p><b>committed pursuant to or in furtherance of a State or organisational policy to commit such attack?</b></p>	<ul style="list-style-type: none"> <li>• Were the perpetrators officials of a State or members of an organisation?</li> <li>• Are there any indications that the attack was planned, promoted or encouraged by a State or organisation?</li> <li>• Were there any orders emanating from a State or organisation to carry out the attack?</li> <li>• Did the perpetrators identify the victims of the attack before the attack was carried out?</li> <li>• Were similar attacks perpetrated against a civilian population by the same State or organisation?</li> <li>• Were the acts of violence supported by prior public statements of State authorities/leaders of the organisations?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a member of the government describing how the government has been purchasing weapons and military equipment in preparation for an attack for several weeks or months.</li> <li>• Forensic ballistics evidence showing that the projectiles launched during an invasion all belonged to a particular State.</li> <li>• Photographs taken of a convoy of tanks and other military vehicles, clearly displaying the flag of a State, crossing the border ahead of an invasion.</li> <li>• UN reports describing a pattern of similar attacks – all including murder, torture and rape – across numerous different towns.</li> <li>• Radio transmissions in which soldiers talk among themselves about carrying out civilian killings in Bucha.</li> </ul>
<p><b>Does the evidence demonstrate that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population?</b></p>	<ul style="list-style-type: none"> <li>• What evidence indicates that the perpetrator was aware that a widespread or systematic attack against a civilian population was taking place?</li> <li>• Which circumstances of the attack indicate that the perpetrator was aware that their conduct formed a part of the attack or intended it to be part of the attack (e.g., did the perpetrator make any comments or statements regarding the attack)?</li> <li>• Was the perpetrator involved in the planning or the execution of the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• The testimony of an insider witness describing how the perpetrator was extensively involved in the planning and organisation of an attack against a civilian population.</li> <li>• Official military documents signed by the perpetrator ordering subordinates to carry out an attack against a town.</li> <li>• Photographs showing the perpetrator in a high-level meeting where the plans to attack a civilian population were formulated.</li> <li>• Reports of NGOs and CSOs describing the details of a widespread and systematic attack committed against civilians of a certain ethnicity, highly indicative of knowledge of this fact on the part of the perpetrator.</li> </ul>

*Table 3: Crimes against Humanity Contextual Elements*

### **3.1.2 War Crimes: Contextual Elements**

For an act to be qualified as a war crime, it must be accompanied by the following contextual elements:

1. The conduct took place in the context of and was associated with an international or non-international armed conflict; and
2. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

War crimes are contained in Article 438 of the CCU, which prohibits “cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognised by international instruments consented to as binding by the Verkhovna Rada of Ukraine”.

While Article 438 of the CCU does not expressly include the contextual elements of war crimes, they nonetheless must be established to prove war crimes under this provision. In addition, Article 438 also explicitly criminalises methods of warfare “prohibited by international instruments” and “any other violations of rules of the warfare recognized by international instruments”, with “international instruments” referring to, for example, the Geneva Conventions and their Additional Protocols, which are only applicable in situations of armed conflict.<sup>248</sup>

Draft Bill 7290, if and when it enters into force, will also require that war crimes be committed (or inflicted/executed) in connection with an international or non-international armed conflict.<sup>249</sup>

As such, war crimes under Article 438 of the CCU in its current form, or Draft Bill 7290, cover broadly the same contextual elements contained in the Rome Statute and customary international law.

### **3.1.2.1 Contextual Element One: The Conduct Took Place in the Context of and was Associated with an International or Non-International Armed Conflict**

#### **3.1.2.1.1 Existence of an International Armed Conflict or a Non-International Armed Conflict**

Practitioners must first seek information establishing the existence of either an international armed conflict (‘IAC’) or a non-international armed conflict (‘NIAC’). As described below, this determination will affect which war crimes apply to the situation.

##### **3.1.2.1.1.1 The Existence of an IAC**

During an IAC, the war crimes contained in the following provisions are applicable: (i) Articles 8(2)(a) and 8(2)(b) of the Rome Statute; (ii) Article 438 of the CCU, which covers violations of the four Geneva Conventions and Additional Protocol I; and (iii) all war crimes listed in Draft Bill 7290. *See* Section 2.1.2.2 for an overview of the conditions that need to be met to establish an IAC.

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence demonstrate that a State(s) used force against another State?</b>	<ul style="list-style-type: none"> <li>Has there been resort to armed force between States?</li> <li>Has a State sent members of its armed forces across the border into a neighbouring State without consent?</li> <li>Has a State attacked another State from the air?</li> <li>Has one State launched missiles from its own territory towards targets in another State’s territory?</li> </ul>	<ul style="list-style-type: none"> <li>Video footage of a public address given by a Head of State in which they declare that a ‘sepcial military operation’ will be launched in a neighbouring State.</li> <li>Witness testimony describing how they saw a convoy of military vehicles belonging to the armed forces of a neighbouring State cross the border.</li> <li>Satellite imagery showing the movement of troops and military</li> </ul>

<sup>248</sup> See e.g., First Geneva Convention, Articles 2, 3.

<sup>249</sup> Draft Bill 7290, Article 438.



	<ul style="list-style-type: none"> <li>Has a State formally declared war against another State?</li> </ul>	<p>vehicles and equipment across the border from one State into another State.</p> <ul style="list-style-type: none"> <li>Forensics ballistics evidence showing that a building was destroyed by a missile belonging to another State.</li> <li>Reports from CSOs describing several incidents of armed confrontations between the armed forces of two States.</li> <li>UN reports describing a pattern of the use of explosive weapons in a coordinated fashion across various cities such as Mariupol, Luhansk, Kremenchuk and Vinnytsia.</li> </ul>
<b>OR Does the evidence demonstrate that one State is occupying another State?</b>	<ul style="list-style-type: none"> <li>Are the armed forces of the State physically present in another State?</li> <li>Has a foreign State stationed its armed forces in another State's territory for the purposes of enforcing its authority?</li> <li>Is this presence un-consented to?</li> <li>Has the local government surrendered, withdrawn or been defeated?</li> <li>Has the territorial State lost governing authority over a particular part of its territory?</li> <li>Is the foreign State in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government? For example: <ul style="list-style-type: none"> <li>Has the State established a temporary administration?</li> <li>Has the State issued orders to civilians in an occupied territory?</li> <li>Has the State issued laws or taken control of law enforcement?</li> <li>Has the State taken authority over the borders or other institutions such as education, hospitals, etc?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Satellite imagery of the presence of the armed forces of the Occupying Power in the territory.</li> <li>Official government documents detailing plans for the establishment of a temporary governing administration in another State's territory.</li> <li>Witness testimony from members of the local territorial government describing how they have lost all authority in the region.</li> <li>Video footage of members of law enforcement of the Occupying Power making arrests in the occupied territory.</li> <li>Images from local residents showing the Sloviansk city council under the control of heavily armed men.</li> <li>Video footage of a speech given by the newly appointed head of the occupying administration declaring a referendum to vote on being incorporated into the Occupying Power.</li> <li>Documentary evidence of Decrees and Laws published by the Occupying Power.</li> <li>A UN Commission Report documenting patterns of executions, unlawful confinement, torture, ill-treatment, rape and other acts of sexual violence committed in areas occupied by an Occupying Power's armed forces.</li> </ul>
<b>OR Does the evidence demonstrate that there has been a resort to armed</b>	<ul style="list-style-type: none"> <li>Is there an armed conflict between a territorial State and a non-state armed group?</li> <li>Is another State involved in coordinating/ planning the activities</li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony from members of the non-state armed group describing how their military activity is all planned and coordinated by the State.</li> <li>Forensic ballistics evidence</li> </ul>

<b>force between a State and a non-state armed group that was operating under the overall control of another State?</b>	<p>of a non-state armed group that is fighting against the territorial State?</p> <ul style="list-style-type: none"> <li>• Has the controlling State provided weapons, equipment or logistical support to the non-state armed group?</li> <li>• Has the controlling State provided financial support to a non-state armed group engaged in fighting against the territorial State?</li> <li>• Does the controlling State share goals with the non-state armed group?</li> <li>• Has the controlling State transferred officers to the non-state armed group?</li> <li>• Does the State direct and supervise the non-state armed group?</li> <li>• Are there similarities between the ranks and structures of the State and the non-state armed group?</li> <li>• Did the State train members of the non-state armed group?</li> </ul>	<p>demonstrating that the weapons used by an armed group in an attack all belonged to the State.</p> <ul style="list-style-type: none"> <li>• Official government documents showing that the State made large-scale weapons transfers to an armed group engaged in hostilities against the territorial State.</li> <li>• Military documents sent by the State to a non-state armed group detailing plans for military operations.</li> <li>• A video of a commander from a non-state armed group expressing their commitment to the goals and objectives of the State.</li> <li>• Photographs taken of members of a non-state armed group participating in training sessions led by the armed forces of the State.</li> <li>• A series of UN reports condemning the involvement of a State in supporting the activities of a non-state armed group by providing finances, weapons, equipment, etc.</li> </ul>
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Table 4: Establishing an IAC

#### 3.1.2.1.1.2 The Existence of a NIAC

During a NIAC, the war crimes contained in the following provisions are applicable: (i) Articles 8(2)(e) and 8(2)(e) of the Rome Statute; (ii) Article 438 of the CCU, which covers violations of Common Article 3 to the four Geneva Conventions and Additional Protocol II; and (iii) all war crimes listed in Draft Bill 7290, apart from those listed under Article 438(1). See Section 2.1.2.1 for an overview of the conditions that need to be met to establish the existence of a NIAC.

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence demonstrate that the non-state armed group(s) involved are sufficiently organised?</b>	<ul style="list-style-type: none"> <li>• Does the group have a formal command structure and internal hierarchy?</li> <li>• Does the group have a headquarters?</li> <li>• Does the group control territory?</li> <li>• What kind of weapons and equipment does the group have access to?</li> <li>• Does the group operate pursuant to a defined and unified military strategy?</li> <li>• Is the group capable of negotiating agreements such as ceasefires and peace accords?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a member of the armed group detailing how all members were duty-bound to follow their superior's orders.</li> <li>• Satellite imagery of heavy weaponry used by the non-state armed group.</li> <li>• A photograph of members of the armed group wearing the same uniform and carrying the same weapons.</li> <li>• An aerial photograph of the armed group's headquarters.</li> <li>• An official copy of a temporary ceasefire agreement signed by the leader of the non-state armed group and a government representative.</li> </ul>

		<ul style="list-style-type: none"> <li>• CSO reports describing how the non-state armed group used similar military tactics in each of its operations.</li> <li>• Witness testimony from several residents of a town stating that the non-state armed group exercises control over the territory.</li> </ul>
<p><b>Does the evidence demonstrate that the armed force between the State and the non-state armed group(s) reached the requisite level of intensity?</b></p>	<ul style="list-style-type: none"> <li>• Has a State deployed its armed forces to engage in hostilities against a non-state armed group in a particular region?</li> <li>• How many individual confrontations have there been?</li> <li>• How many casualties have resulted from the fighting?</li> <li>• Has the fighting resulted in substantial material destruction?</li> <li>• What type /calibre of weapons have been used by both sides to the conflict?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from civilians describing how several armed confrontations have taken place between a non-state armed group and the State's armed forces in the local area.</li> <li>• Photographs of buildings heavily damaged by missile fire.</li> <li>• Forensic ballistics evidence showing that heavy weaponry was used by State forces in hostilities against the non-state armed group.</li> <li>• UN reports describing high numbers of civilian casualties resulting directly from armed hostilities between the non-state armed group and State forces.</li> <li>• Maps showing the control of territory by the non-state armed group.</li> </ul>

Table 5: Establishing a NIAC

#### 3.1.2.1.2 *Nexus with the Armed Conflict*

Only those criminal acts committed 'in the context of' and 'associated with' an armed conflict can qualify as war crimes.<sup>250</sup> The nexus requirement means that the **conduct must have been closely linked** to the armed conflict taking place in any part of the territories controlled by the parties to the conflict.<sup>251</sup> In other words, there must be a sufficient geographical and temporal link between the conduct and the hostilities.<sup>252</sup> However, the information does not need to demonstrate that the conflict alone was at the root of the conduct, or that the conduct took place in the middle of a battle or at a time or place where fighting was actually taking place.<sup>253</sup>

Factors that may point to a nexus between a criminal act and an armed conflict include, among others, the fact that: the perpetrator is a combatant; the victim is a non-combatant or member of the

<sup>250</sup> ICC Elements of Crimes, Article 8, Introduction (c); ICC, *Ntaganda Trial Judgement*, para. 731 ("For conduct to qualify as a war crime, a nexus must be established with the armed conflict in question. The nexus requirement serves to distinguish war crimes from crimes that ought to be treated as purely domestic, and it prevents random or isolated criminal occurrences from being characterised as war crime"); ICC, *Katanga Decision on the Confirmation of Charges*, paras. 379, fn. 495.

<sup>251</sup> *Bemba Trial Judgment*, para. 142; *Katanga Trial Judgment*, para. 1176.

<sup>252</sup> *Prosecutor v. Stakić*, IT-97-24-A, *Appeal Judgment*, 22 March 2006, paras 343-347.

<sup>253</sup> *Bemba Trial Judgment*, para. 142; *Kunarac et al. Trial Judgment*, para. 57; *Ntaganda Trial Judgement*, para.731.

opposing party; the act serves the ultimate goal of a military campaign; or the act was committed in connection with the perpetrator's official duties.<sup>254</sup>

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence demonstrate that the conduct took place in the context of and was associated with an international or non-international armed conflict?</b>	<ul style="list-style-type: none"> <li>• Was the crime committed in the territory of a State where an armed conflict was taking place?</li> <li>• Was the perpetrator a combatant belonging to a party to the armed conflict?</li> <li>• Was the crime committed as part of or in the context of the perpetrator's official duties?</li> <li>• Was the victim a civilian or person protected by the laws and customs of war (i.e., medical personnel, a prisoner of war, a person <i>hors de combat</i> (see Section 3.2.30.2), etc.)?</li> <li>• Did the victim and the perpetrator belong to opposing sides?</li> <li>• Did the act of violence serve the ultimate goal of the military campaign of the side to which the perpetrator belongs?</li> <li>• Was the perpetrator's ability to commit the crime shaped by or dependent upon the existence of an armed conflict?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing that the victims were targeted for the purpose of destabilising, humiliating or punishing opposition to the invading forces, and their newly installed occupation administration.</li> <li>• A video posted on social media showing members of an armed group looting and destroying civilian homes in the aftermath of an attack carried out against a civilian town.</li> <li>• Forensic ballistics evidence showing that civilian objects were heavily damaged by explosives used during hostilities.</li> <li>• UN reports detailing how a party to an armed conflict regularly uses civilians as human shields as a method of warfare.</li> <li>• Photographs of heavily damaged /destroyed civilian buildings following an armed confrontation.</li> </ul>

Table 6: Establishing the Nexus

### 3.1.2.2 Contextual Element Two: The Perpetrator was Aware of the Factual Circumstances that Established the Existence of an Armed Conflict

To establish the second contextual element of war crimes, the information must show that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.<sup>255</sup> The perpetrator must also be aware of the link between these factual circumstances and their conduct.<sup>256</sup>

This can be inferred from information that shows the perpetrator's:<sup>257</sup>

- (i) participation in the relevant armed conflict;
- (ii) status (as a combatant, commander, civilian leader, etc.);
- (iii) involvement in the provision of weapons to others;

<sup>254</sup> Bemba Trial Judgment, para. 143; Katanga & Chui Decision on the Confirmation of Charges, para. 382; Kunarac et al. Appeal Judgment, para. 59.

<sup>255</sup> Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Trial Judgment, 14 March 2012 ('Lubanga Trial Judgment'), para. 1016; Katanga Trial Judgment, para. 794.

<sup>256</sup> Lubanga Trial Judgment, para. 1016.

<sup>257</sup> Bemba Decision on the Confirmation of Charges, para. 264; Katanga Trial Judgment, para.1231; Lubanga Trial Judgment, para. 1350.

- (iv) involvement in discussions relating to military plans and advancements;
- (v) membership in a military hierarchy or a chain of command; and
- (vi) receipt or awareness of military reports in relation to the conflict.

The establishment of this element is generally not difficult. It is hard to imagine a situation where the criminal conduct is shown to have been committed ‘in the context of’ and ‘associated with’ an armed conflict, but, at the same time, the perpetrator was unaware of the existence of the armed conflict.<sup>258</sup>

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence demonstrate that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict?</b>	<ul style="list-style-type: none"> <li>• Was the existence of the armed conflict widely known?</li> <li>• Was the perpetrator a military or political figure engaged in any way in the armed conflict?</li> <li>• Did the perpetrator provide weapons, receive military reports or were they involved in military decisions?</li> <li>• Did the perpetrator make any statements indicating their awareness of the factual circumstances that established the existence of an armed conflict?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how the perpetrator joined a non-state armed group when an armed conflict broke.</li> <li>• An official military document signed by the perpetrator ordering their subordinates to take over a town inhabited by civilians.</li> <li>• A photograph of the perpetrator wearing military uniform and holding a weapon.</li> <li>• Official statements issued by the perpetrator revealing their plans to launch a full-scale military invasion in a certain region.</li> </ul>

Table 7: Establishing the Perpetrator’s Awareness of the Armed Conflict

### 3.1.3 Genocide: Common Elements

Article II of the Genocide Convention, adopted by the UN General Assembly on 9 December 1948, defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”.<sup>259</sup> Ukraine ratified the Genocide Convention on 15 November 1954.<sup>260</sup> According to the International Court of Justice (‘ICJ’), the Convention’s definition of genocide reflects customary international law.<sup>261</sup>

Article 6 of the Rome Statute reproduces the definition of genocide contained in the Genocide Convention. Accordingly, for an act to constitute genocide under Article 6 of the Rome Statute, it must be committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious

<sup>258</sup> Cryer et al. (2015), p. 287.

<sup>259</sup> Genocide Convention, Article 2.

<sup>260</sup> Genocide Convention - United nations treaty Collection, Statutes of Treaties.

<sup>261</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (‘*Bosnia Genocide Judgment*’), para. 161.

group, as such.<sup>262</sup> In particular, the ICC Elements of Crimes require each of the following common elements to be established:<sup>263</sup>

1. The victim(s) belong to a particular national, ethnic, racial or religious group;
2. The perpetrator(s) intended to destroy, in whole or in part, that national, ethnic, racial or religious group, as such; and
3. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Genocide is prohibited under Article 442 of the CCU and defined as a “wilfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grave bodily injuries on them, creation of life condition aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another”. The phrase ‘wilfully committed an act for the purpose of total or partial destruction’ is analogous to the Rome Statute’s requirement that the act must be committed with the ‘intent to destroy, in whole or in part’.

In addition, Draft Bill 7290, if and when it enters into force, will amend the definition of genocide to “an act intentionally committed for the purpose of the total or partial destruction of any national, ethnic, racial or religious group as such”. Although incorporating minor alterations to the language, this definition covers the same conduct as the current Article 442.

The CCU follows the Genocide Convention and does not expressly contain the requirement that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction, which is unique to the ICC.

### ***3.1.3.1 Common Element One: The Victim(s) Belong to a Particular National, Ethnic, Racial or Religious Group***

The victims of genocide must belong to one of the four enumerated groups contained in the Genocide Convention and international criminal statutes, namely a national, ethnic, racial or religious group.<sup>264</sup>

These groups have been defined as follows:

- **National groups** comprise individuals sharing a recognised/perceived legal bond of common citizenship recognised in law (i.e., under the legal system of a State) or by the international community, and a shared understanding and reciprocity of rights and duties.<sup>265</sup>
- **Ethnic groups** comprise individuals sharing a common language, traditions, history, social structures and culture, including, for instance, tribal customs and traditional links to land.<sup>266</sup>

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<sup>262</sup> Rome Statute, Article 6.

<sup>263</sup> ICC Elements of Crimes, Article 6.

<sup>264</sup> Genocide Convention, Article 2; Rome Statute, Article 6; ICTY Statute, Article 4; ICTR Statute, Article 2.

<sup>265</sup> *Akayesu* Trial Judgment, para. 512.

<sup>266</sup> *Al Bashir* Decision on the Prosecution’s Application for a Warrant of Arrest, paras 23, 137; International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General (25 January 2005), pp. 117, 127 (fn. 183), 129; *Akayesu* Trial Judgment, para. 513.



- **Racial groups** comprise individuals who share hereditary physical traits (e.g., colour of skin) often identified with a geographic region, irrespective of linguistic, cultural, national or religious factors.<sup>267</sup>
- **Religious groups** comprise individuals who share the same religion, mode of worship or religious beliefs.<sup>268</sup>

Membership can be established using either an objective approach (i.e., based on whether the targeted group has certain characteristics) or a subjective approach (i.e., how they are perceived by members of the group and others, including the perpetrator).<sup>269</sup> However, the group targeted for genocide cannot be defined in negative terms, i.e., for characteristics, they do not possess, for example, “non-Russians”.<sup>270</sup>

### 3.1.3.2 Common Element Two: The Perpetrator Intended to Destroy, in Whole or in Part, that National, Ethnic, Racial or Religious Group, as such

The second common element sets out a specific mental element for the crime of genocide. Thus, the information must establish that the prohibited criminal acts of genocide (*see* Sections 3.2.48 to 3.2.52) were committed with a **specific intent on the part of the perpetrator to destroy, in whole or in part**, a particular national, ethnic, racial or religious group, as such (also referred to as ‘genocidal intent’).<sup>271</sup> This specific genocidal intent must be established in addition to proof of intent to commit the underlying act (*see* Section 3.3.2).<sup>272</sup>

In particular, practitioners should consider the following:

- A finding of genocide does not require the actual extermination of the group in its entirety, but is, instead, satisfied if one of the acts of genocide (*see* Sections 3.2.48 to 3.2.52) is committed with the *intent to destroy*.<sup>273</sup> In other words, it must be shown that the perpetrator sought to achieve the destruction of a group, in whole or in part.<sup>274</sup>
- The intent must go beyond mere discriminatory targeting, but instead be directed towards the *destruction* of the group as a “separate and distinct entity”.<sup>275</sup> The perpetrator must have intended to destroy the group **in whole or in part**, i.e., to destroy at least a substantial part of the group, regardless of the ultimate number of victims.<sup>276</sup> Whether the targeted group is

<sup>267</sup> *Akayesu* Trial Judgment, para. 514; *Kayishema et al.* Trial Judgment, para. 98.

<sup>268</sup> *Akayesu* Trial Judgment, para. 515; *Kayishema et al.* Trial Judgment, para. 98.

<sup>269</sup> *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement and Sentence, 15 May 2003 (*‘Semanza Judgment and Sentence’*), para. 317; *Jelisić* Trial Judgment, paras 69-72; *Kayishema et al.* Trial Judgment, para. 98.

<sup>270</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016, para. 541; *Stakić* Appeal Judgment, paras 16-17. *See also, Jelisić* Trial Judgment, paras 71-72.

<sup>271</sup> Rome Statute, Article 6.

<sup>272</sup> *Krstić* Appeal Judgment, para. 20; *Popović et al.* Trial Judgment, para. 808. *See also, Bosnia Genocide Judgment*, para.186.

<sup>273</sup> *Akayesu* Trial Judgment, paras 518, 520. *See also, Rutaganda* Trial Judgment, paras 59-61; *Prosecutor v. Kambanda*, ICTR 97-23-S, Judgment and Sentence, 4 September 1998 (*‘Kambanda Judgment and Sentence’*), para. 16.

<sup>274</sup> *Jelisić* Trial Judgment, para. 81; *Krstić* Trial Judgment, para. 550.

<sup>275</sup> *See e.g., Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment, 10 June 2010 (*‘Popović et al. Trial Judgment’*), para. 1312; *Brđanin* Trial Judgment, para. 698.

<sup>276</sup> *Krstić* Appeal Judgment, para. 12; *Prosecutor v. Mladić*, MICT-13-56-A, Appeal Judgment, 8 June 2021, para. 576; *Kayishema et. al* Trial Judgment, para. 97; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 64; *Krstić* Trial

substantial enough may be determined by factors including the numeric size of the targeted part of the group relative to the overall group, the prominence within the group of the targeted part of the group, and the area of the perpetrators' activity and control as well as the possible extent of their reach.<sup>277</sup>

- The perpetrator must have targeted the victims due to their membership in the group, with the ultimate aim of destroying the group (as indicated by the words '**as such**').<sup>278</sup> This does not preclude cases where the perpetrator was motivated by other factors as well, such as a personal motive of sexual gratification, or to obtain personal economic benefits, political advantage or some form of power.<sup>279</sup>
- The destruction must be physical or biological (rather than mere cultural destruction).<sup>280</sup> Biological destruction is geared toward "the regenerative power of the group", whereas physical destruction aims at "the annihilation of the existing group".<sup>281</sup>

While it can be difficult, or even impossible, to uncover *direct* evidence of the perpetrator's specific intent to commit genocide (i.e., 'genocidal intent'), such intent can be inferred from the facts and circumstances,<sup>282</sup> including the following factors:

- **Statements of the perpetrator**, including where they contain no explicit appeal to commit genocide but still constitute direct incitement to commit genocide within the particular context;<sup>283</sup>
- **The general context of the situation**: for example, the systematic commission of culpable acts directed against the targeted group committed by the same perpetrator or by others or the unstable environment/violent atmosphere that existed between the perpetrator's group and the targeted group;<sup>284</sup>

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Judgment, para. 590; *Prosecutor v. Gatete*, ICTR-2000-61-T, Judgment and Sentence, 31 March 2011 ('*Gatete* Judgment and Sentence'), para. 582. See also, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Judgment and Sentence, 17 May 2011, para. 2072.

<sup>277</sup> *Krstić* Appeal Judgment, paras 12-14; *Brdanin* Trial Judgment, paras 701-702; *Popović et al.* Appeal Judgment, para. 422.

<sup>278</sup> *Bosnia Genocide* Judgment, para. 193; *Stakić* Trial Judgment, para. 521; *Tolimir* Trial Judgment, para. 746; *Prosecutor v. Muhimana*, ICTR- 95-1B-T, Trial Judgment, 28 April 2005 ('*Muhimana* Trial Judgment'), para. 500; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 ('*Kajelijeli* Trial Judgment'), para. 813; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgment and Sentence, 12 September 2006, para. 485.

<sup>279</sup> *Jelisić* Appeal Judgment, para. 49; *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Appeal Judgment, 9 July 2004, para. 53; *Jelisić* Trial Judgment; Human Rights Council, "They Came to Destroy": ISIS Crimes Against the Yazidis' (15 June 2016) A/HRC/32.CRP.2, para. 158.

<sup>280</sup> *Krstić* Trial Judgment, para. 580; International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General, pp. 4, 53, 124 (fn. 176), 129, 160.

<sup>281</sup> Global Justice Center, 'Beyond Killing: Gender, Genocide, & Obligations Under International Law' (December 2018), p. 34.

<sup>282</sup> *Akayesu* Trial Judgment, para. 523; *Prosecutor v. Sikirica et al.*, IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001 ('*Sikirica et al.* Judgment on Defence Motions to Acquit'), para. 46; *Kayishema et al.* Trial Judgment, para. 93.

<sup>283</sup> *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Judgment and Sentence, 30 September 2011 ('*Bizimungu et al.* Judgment and Sentence'), para. 1974; *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-T, Judgment and Sentence, 2 February 2012, paras 1597-1598; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Judgment and Sentence, 24 June 2011 ('*Nyiramasuhuko et al.* Judgment and Sentence'), para. 6012; *Nzabonimana* Judgment and Sentence, para. 1712.

<sup>284</sup> *Akayesu* Trial Judgment, para. 523; *Prosecutor v. Ndindabahizi*, ICTR-2001- 71.I, Judgment and Sentence, 15 July 2004 ('*Ndindabahizi* Judgment and Sentence'), para. 460; *Muhimana* Trial Judgment, para. 496; *Nyiramasuhuko et al.* Judgment and Sentence, para. 5732. See also, *Bizimungu et al.* Judgment and Sentence, para. 1958; *Prosecutor v. Ndahimana*, ICTR-01-

- **The repetition** of destructive and discriminatory acts;<sup>285</sup>
- **The deliberate, discriminatory and systematic** targeting of the victims and their property due to their membership in the group and the exclusion of the members of other groups from targeting;<sup>286</sup>
- **The nature, severity, scale and geographic reach** of the crimes committed against the members of the group, including the weapons employed and the extent of bodily injury.<sup>287</sup> The scale and intensity of sexual violence may also evidence a genocidal intent, particularly where such violence causes the victims to be “so traumatized that they can no longer contemplate a procreative relationship, even after their return to their own group”.<sup>288</sup>
- **The organisation or planning** aimed towards the targeting of the group;<sup>289</sup>
- **The use of derogatory language** toward members of the targeted group and the number of victims;<sup>290</sup> and
- **The political doctrine** (outlined by the measures, policies, speeches or projects of the perpetrator(s)) which gave rise to the criminal acts.<sup>291</sup>

### 3.1.3.3 *Common Element Three: The Conduct took Place in the Context of a Manifest Pattern of Similar Conduct Directed Against that Group or was Conduct that could Itself Effect such Destruction*

The Genocide Convention does not expressly require this contextual element,<sup>292</sup> and neither do the Statutes or case law of the *ad hoc* tribunals require the existence of a plan or policy as an element of the crime of genocide.<sup>293</sup> Consequently, within these frameworks, it is irrelevant whether the conduct was capable of posing any concrete threat to the existence of the targeted group, or a part of the targeted group.<sup>294</sup> The CCU follows the Genocide Convention and does not expressly contain this

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68-T, Judgment and Sentence, 30 December 2011 (*Ndahimana Judgment and Sentence*), para. 804; *Niyiramasuhuko et al.* Appeal Judgment, para. 1029.

<sup>285</sup> *Jelisić* Appeal Judgment, para. 47. See also, *Gatete* Judgment and Sentence, para. 583; *Niyiramasuhuko et al.* Judgment and Sentence, para. 5732. See also, *Bizimungu et al.* Judgment and Sentence, para. 1958; *Ndahimana* Judgment and Sentence, para. 804; *Prosecutor v. Kalimanzira*, ICTR-05-88-T, Judgment and Sentence, 22 June 2009 (*Kalimanzira Judgment and Sentence*), para. 731; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgment and Sentence, 12 September 2006, para. 29.

<sup>286</sup> *Krstić* Trial Judgment, paras 546-547, 594-595, 597; *Brdanin* Trial Judgment, para. 983; *Kayishema et al.* Trial Judgment, para. 93; *Kalimanzira* Judgment and Sentence, para. 731; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgment and Sentence, 12 September 2006, para. 29.

<sup>287</sup> *Akayesu* Trial Judgment, para. 523; *Muhimana* Trial Judgment, para. 496; *Ndindabahizi* Judgment and Sentence, para. 461; *Sikirica et al.* Judgment on Defence Motions to Acquit, para. 94; I, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment, 21 May 1999 (*Kayishema and Ruzindana Trial Judgment*), para. 93.

<sup>288</sup> Global Justice Center, ‘Beyond Killing: Gender, Genocide, & Obligations Under International Law’ (December 2018), p. 35.

<sup>289</sup> *Popović et al.* Trial Judgment, paras 1314-1318, 1399; *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Judgment and Sentence, 31 May 2012 (*Nzabonimana Judgment and Sentence*), paras 1527, 1538.

<sup>290</sup> *Kayishema and Ruzindana* Trial Judgment, para. 93; *Kajelijeli* Trial Judgment, para. 806; *Gacumbitsi* Trial Judgment, para. 253.

<sup>291</sup> *Akayesu* Trial Judgment, para. 524.

<sup>292</sup> Genocide Convention, Article 2; *Al Bashir* Decision on the Prosecution’s Application for a Warrant of Arrest, para. 117.

<sup>293</sup> ICTY Statute, Article 4; ICTR Statute, Article 2; *Jelisić* Trial Judgment, para. 100; *Akayesu* Trial Judgment, paras 520, 523. See also, *Krstić* Appeal Judgment, para. 224; *Popović et al.* Trial Judgment, para. 829. See also, *Al Bashir* Decision on the Prosecution’s Application for a Warrant of Arrest, para. 119.

<sup>294</sup> *Krstić* Trial Judgment, para. 133; *Akayesu* Trial Judgment, para. 498; *Kayishema and Ruzindana* Trial Judgment, para. 170; *Al Bashir* Decision on the Prosecution’s Application for a Warrant of Arrest, para. 119.

contextual element. Consequently, practitioners do not need to demonstrate that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction for the crime of genocide to be established.

However, for the purposes of the ICC, the ICC Elements of Crimes require that “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.<sup>295</sup> As such, before the ICC, the crime of genocide occurs only “when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical”.<sup>296</sup>

Finally, for an act to be qualified as genocide, the practitioner must establish that:

- The conduct of the perpetrator took place in the context of other conduct that was large in scale, systematic and followed a similar pattern (i.e., “a manifest pattern of similar conduct”).<sup>297</sup> This includes the initial acts of a pattern that became obvious only later (i.e., an emerging pattern).<sup>298</sup> This is an objective qualification.<sup>299</sup>
- If there was not a manifest pattern of similar conduct, the conduct must have been of a nature and gravity that could itself effect such destruction. In other words, the conduct of the perpetrator must be severe enough to destroy the group, in whole or in part, on its own, for example, through the use of a weapon of mass destruction.<sup>300</sup>
- The perpetrator must be aware that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>301</sup>

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence demonstrate that the victim(s) belong to a particular national, ethnic, racial or religious group?</b>	<ul style="list-style-type: none"> <li>• Did the victims: <ul style="list-style-type: none"> <li>○ have physical traits distinguishing them from the others, including the perpetrator(s)?</li> <li>○ speak a common language different from that of the perpetrator(s)?</li> <li>○ share traditions and heritage different from those of the perpetrator(s)?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• A registry of victims establishing that they were all of the same nationality.</li> <li>• Testimonial evidence that the town which was attacked was predominately inhabited by persons of the same nationality.</li> <li>• A witness testifying that they were raped by a soldier and told “it was to prevent them from having Ukrainian children”.</li> </ul>

<sup>295</sup> ICC Elements of Crimes, Article 6(b); *Al Bashir* Decision on the Prosecution’s Application for a Warrant of Arrest, para. 123.

<sup>296</sup> *Al Bashir* Decision on the Prosecution’s Application for a Warrant of Arrest, para. 124.

<sup>297</sup> *Al Bashir* Second Decision on the Prosecution’s Application for a Warrant of Arrest, para. 16; *Al Bashir* Decision on the Prosecution’s Application for a Warrant of Arrest, Separate and Partly Dissenting Opinion of Judge Anita Usacka, para. 19; R. Cryer et al. (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn, CUP 2015) (“Cryer et al. (2015)”), p. 218.

<sup>298</sup> ICC Elements of Crimes, Article 6, Introduction (a).

<sup>299</sup> ICC Elements of Crimes, Article 6, Introduction (b).

<sup>300</sup> V. Oosterveld in R. S. Lee (ed.) *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence* (Piragoff 2001), p. 46, n. 28.

<sup>301</sup> See Rome Statute, Article 30(3).

	<ul style="list-style-type: none"> <li>○ possess a common nationality other than that of the perpetrator(s)?</li> <li>○ possess common beliefs other than those of the perpetrator(s)?</li> <li>○ share the same religious rituals (including modes of worship) different than those of the perpetrator(s)?</li> <li>○ share any national, ethnic, racial or religious affiliation?</li> <li>• Did the victims themselves perceive, or did others perceive them, to be part of a national, ethnic, racial or religious group?</li> </ul>	<ul style="list-style-type: none"> <li>• Video footage of the perpetrator calling the victims a slur referring to people from a specific nationality.</li> <li>• A soldier testifying that they were ordered to attack civilians in Ukraine.</li> <li>• Official identity cards and birth certificates distinguishing members of the targeted ethnic group from the rest of the population.</li> <li>• Videos and photographs of the victims attending their own schools and speaking their own language.</li> <li>• A UN Human Rights Council report describing how fighters of the armed group regarded the targeted group (i.e., as belonging to a different nationality).</li> </ul>
<b>Does the evidence demonstrate that the perpetrator intended to destroy, in whole or in part, that national, ethnic, racial or religious group, as such?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator select members of the group for targeting?</li> <li>• Did the perpetrator intend for the physical or biological destruction of at least a substantial part of the group?</li> <li>• Were other crimes systematically committed against the group?</li> <li>• What was the nature, severity and scale (including number of victims) of the crimes committed against the group?</li> <li>• What was the geographical and temporal scope of the attack against the group?</li> <li>• Was there a repetition of discriminatory and destructive acts?</li> <li>• Were the attacks planned and organised?</li> <li>• Are there any public statements or documents indicating the existence of a genocidal plan or policy?</li> <li>• Did the perpetrator use discriminatory language?</li> </ul>	<ul style="list-style-type: none"> <li>• Witnesses testifying that, during an attack against the targeted national group, they heard the perpetrator call the men “scum” and “filth”, before killing them.</li> <li>• Radio communications between soldiers discussing how they had questioned Ukrainian soldiers as well as civilians before shooting them.</li> <li>• Intercepted phone conversations involving the perpetrator about the targeted group, including that they would all disappear from the face of the earth and that they will no longer exist.</li> <li>• Witness testimony detailing how unarmed Ukrainian civilians were being killed in their homes and in the streets.</li> <li>• Policy communiques within the armed group calling on members to “neutralise by all means possible” the enemy, i.e., the targeted national group.</li> <li>• A UN report on repeated targeting of a particular national group indicating that genocide was committed against that group due to the scale and severity of the attack, which lasted over several weeks and resulted in the deaths of thousands of people.</li> </ul>
<b>Does the evidence demonstrate that the conduct took</b>	<ul style="list-style-type: none"> <li>• Was the conduct against the targeted group large in scale?</li> <li>• Did the acts/conduct follow a similar pattern?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimonies indicating that the attack affected hundreds of thousands of individuals and took place across a large geographical area.</li> </ul>

<p><b>place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction? (Note, only required for the ICC)</b></p>	<ul style="list-style-type: none"> <li>• What means of attack were employed during those acts?</li> <li>• What was the geographical/temporal scope of the attack?</li> <li>• Was the conduct against the targeted group systematic?</li> <li>• Did a policy/plan to attack the members of a protected group exist?</li> <li>• Does the conduct of the perpetrator fit into a pattern of destructive conduct?</li> <li>• If there is no manifest pattern of genocidal conduct, can it be said that the perpetrator's conduct on its own caused, or was aimed at, the destruction of the group in question or a part of it?</li> </ul>	<ul style="list-style-type: none"> <li>• Reports and appeals made to the authorities regarding the alleged widespread atrocities committed against the female members of a national group.</li> <li>• Evidence gathered through the exhumation of mass graves where a high number of victims belonging to a particular national group were buried.</li> <li>• Photographic slides containing evidence of the large-scale massacre of a national group.</li> <li>• A UN Commission Report documenting patterns of executions, unlawful confinement, torture, ill-treatment, rape and other sexual violence committed in areas occupied by an Occupying Power's armed forces.</li> <li>• A report by a think-tank finding reasonable grounds to conclude that breaches of the Genocide Conventions have been committed.</li> </ul>
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Table 8: Genocide Contextual Elements

## 3.2 DOCUMENTING THE INDIVIDUAL ACTS

'Individual acts' refers to the physical (or material) elements of the individual international crimes. These include acts such as the crime against humanity of murder, which involves the individual act of killing one or more persons; the war crime of torture, which comprises the individual act of inflicting severe physical or mental pain or suffering (among others); and genocide by forcibly transferring children, which requires the perpetrator to forcibly transfer persons (among others).<sup>302</sup>

While the Criminal Code of Ukraine ('CCU') does not currently prohibit crimes against humanity, the CCU does prohibit war crimes, genocide and aggression under Articles 438, 442 and 437, respectively. The individual acts of crimes against humanity, war crimes, genocide and aggression, are set out in Articles 6, 7, 8 and 8*bis* of the Rome Statute of the International Criminal Court ('ICC'), respectively. In addition, the ICC Elements of Crimes sets out each element of the individual crimes that must be established in order to demonstrate that a crime against humanity, war crime, act of genocide or act of aggression have been perpetrated.

The CCU's war crimes provision, set out under Article 438, prohibits:

Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments,

<sup>302</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Articles 7(1)(a), 8(2)(a)(ii) and 6(e); Criminal Code of Ukraine ('CCU'), Articles 438 and 442(1).



or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine [...].

The reference to the “use of means of warfare prohibited by international law” and “other violations of the laws or customs of war envisaged by international agreements” is very general in nature and does not specify which conduct is prohibited by Article 438. However, the reference in these phrases to “international law” and “international agreements” refers to the IHL treaties to which Ukraine is a party (e.g., the four Geneva Conventions of 1949 and Additional Protocol I to the Geneva Conventions of 1977), and thus, the war crimes stipulated within each treaty.<sup>303</sup> Accordingly, the international instruments that interpret these IHL treaties, such as the Rome Statute of the ICC and the jurisprudence of the ICC and other international courts and tribunals, can be relied upon when assessing the exact scope of Article 438.

This section will assess the specific elements of:

- The crimes against humanity of:
  - murder;
  - extermination;
  - enslavement;
  - deportation and forcible transfer;
  - imprisonment;
  - torture;
  - rape;
  - sexual slavery;
  - enforced prostitution;
  - forced pregnancy;
  - sexual violence;
  - persecution;
  - enforced disappearance; and
  - other inhuman acts.
- The war crimes of:
  - wilful killing;
  - torture;
  - inhuman treatment;
  - wilfully causing great suffering;
  - extensive destruction and appropriation of property;
  - compelling service in hostile forces;
  - denying a fair trial;
  - unlawful deportation and forcible transfer;
  - unlawful confinement;
  - taking hostages;

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<sup>303</sup> ICRC, ‘Treaties, States Parties and Commentaries: Ukraine’.

- attacking civilians;
  - attacking civilian objects;
  - attacking personnel, installations, material, units or vehicles involved in humanitarian assistance;
  - excessive incidental death, injury or damage;
  - attacking undefended places;
  - killing or wounding persons *hors de combat*;
  - improper use of a flag of truce;
  - improper use of a flag, insignia or uniform of the hostile party;
  - transfers, directly or indirectly, by the Occupying Power of parts of its civilian population into the territory it occupies, or the deportation or transfer all or parts of the population of the occupied territory within or outside this territory;
  - attacking protected objects;
  - treacherous killing or wounding;
  - destroying or seizing the enemy's property;
  - compelling participation in military operations;
  - pillage;
  - employing prohibited bullets;
  - outrages upon personal dignity;
  - rape;
  - sexual slavery;
  - enforced prostitution;
  - forced pregnancy;
  - sexual violence;
  - using protected persons as shields; and
  - starvation.
- The acts of genocide of:
    - killing;
    - causing serious bodily or mental harm;
    - inflicting conditions of life calculated to bring about physical destruction;
    - imposing measures intended to prevent births; and
    - forcibly transferring children.
  - The crime of aggression.

### **3.2.1 Crime against Humanity of Murder (Article 7(1)(a), Rome Statute)**

Article 7(1)(a) of the Rome Statute prohibits murder as a crime against humanity,<sup>304</sup> which occurs when a person kills or causes the death of another person in the context of a widespread and systematic attack on civilians.

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<sup>304</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(a). The crime against humanity of murder is also prohibited by the following international

Murder as a crime against humanity is not currently prohibited under Ukrainian law. This conduct is, however, covered by the ordinary crime of murder under Article 115 of the Criminal Code of Ukraine ('CCU'), which prohibits "murder, that is intended unlawful causing death of another person". However, the CCU provision does not require the act of murder to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of murder under Article 442-1.2(3) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of murder as a crime against humanity contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>305</sup>

1. The perpetrator killed (caused death to) one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

#### **3.2.1.1 Element One: The Perpetrator Killed One or More Persons**

Firstly, practitioners should seek information to show that one or more persons were killed by the perpetrator. To establish that the perpetrator *killed or caused the death* of one or more persons, the information must demonstrate that: (i) a person is dead; and (ii) that there is a causal link between the perpetrator's unlawful act or omission and that person's death.<sup>306</sup> To establish this causal link, the

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instruments: UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 ('Nuremburg Charter'), Article 6(c); UN, International Military Tribunal for the Far East Charter (19 January 1946), TIAS 1589 ('Tokyo Charter'), Article 5(c); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 5(a); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 3(a); ; UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(a); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 5.

<sup>305</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7(1)(a).

<sup>306</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('Ongwen Trial Judgment'), para. 2696; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 ('Bemba Trial Judgment'), paras 87-88; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014, ('Katanga Trial Judgment'), paras 767-769; *Prosecutor v. Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, ('Katanga & Chui Decision on the Confirmation of Charges') para. 287; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Confirmation of the Charges, 15 June 2009 ('Bemba Decision on the Confirmation of the Charges'), para. 132; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 ('Karadžić Trial Judgment'), para. 446; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgment, 28 February 2005 ('Kvočka et al. Appeal Judgment'), para. 261.

evidence must show that the relevant action or omission was a substantial – but not necessarily the sole – cause of death.<sup>307</sup>

Where the case relies on circumstantial evidence to establish that a killing has taken place, it is not required to show the exact number,<sup>308</sup> nor precise identity,<sup>309</sup> of the alleged victims, as long as their death is the only reasonable conclusion that can be drawn from the evidence.<sup>310</sup>

### 3.2.1.2 General Contextual and Mental Elements

Finally, practitioners should also seek information to establish the general contextual element common to all crimes against humanity, and the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the direct or circumstantial evidence show that a victim is dead?</b>	<ul style="list-style-type: none"> <li>• Did one or more persons die? If so, how many, when, where and how?</li> <li>• Is there direct evidence that the perpetrator killed the victim (e.g., by an act of violence)?</li> <li>• Is there circumstantial evidence showing that the perpetrator killed the victim and/or other unidentified persons?</li> <li>• What was the location and date of the murder?</li> <li>• What were the circumstances of the crime?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that their residential building was destroyed whilst their family members were at home, and that their bodies have not been recovered.</li> <li>• A video posted on social media depicting a body laying lifeless in the street.</li> <li>• A photograph of a victim's corpse.</li> <li>• A video showing Russian soldiers line up men from their neighbourhood and shoot them.</li> <li>• A photograph posted on social media depicting a body laying lifeless in the street.</li> <li>• Satellite imagery showing bodies in a particular area.</li> <li>• A death certificate of the victim.</li> <li>• Reports and records of the occupation authorities listing deaths and details of executions.</li> <li>• Witness testimony describing how the Russian armed forces apprehended several local residents and took the men to their base. Relatives heard screams and gunshots from where the soldiers had detained the victims. The next day,</li> </ul>

<sup>307</sup> *Katanga & Chui* Decision on the Confirmation of Charges, para. 296; *Krnojelac* Trial Judgment, paras 328-329; *Delalić et al.* Trial Judgment, para. 424; *Karadžić* Trial Judgment, para. 448.

<sup>308</sup> *Bemba* Decision on Confirmation of Charges, para. 134.

<sup>309</sup> *Bemba* Trial Judgment, para. 88; *Ongwen* Trial Judgment, para. 2698; *Katanga & Chui* Decision on the Confirmation of Charges, para. 422.

<sup>310</sup> *Bemba* Trial Judgment, para. 88; *Katanga* Trial Judgment, para. 768; *Bemba* Decision on Confirmation of Charges, para. 132; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Decision on Milan Lukić's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings, 12 March 2009, para. 29; *Lukić & Lukić* Appeal Judgment, para. 149.

		they saw the bodies of six men lying on the street where the incident took place
<b>Does the evidence show a causal link between the perpetrator's actions and the victim's death?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator kill or cause the death of the victim through an act or omission?</li> <li>• What were the means by which the act or omission was committed?</li> <li>• Were the perpetrator's actions a substantial cause of the death?</li> </ul>	<ul style="list-style-type: none"> <li>• Forensic autopsies establishing the cause of death of the victim(s) as a fatal blow to the head.</li> <li>• Witness testimony that they saw Russian soldiers in a military convoy on the highway open fire at four civilians who were attempting to flee through the fields.</li> <li>• A video depicting shelling and bullet hole damage (matching weapons used by Russian forces) on cars in which people were found dead.</li> <li>• A photograph of a Russian soldier beating a person who subsequently died.</li> <li>• A forensic autopsy report detailing the cause of death as a blow to the head with a blunt object.</li> </ul>

Table 9: Article 7(1)(a) Cues for Practitioners

### 3.2.2 Crime Against Humanity of Extermination (Article 7(1)(b), Rome Statute)

Article 7(1)(b) of the Rome Statute prohibits the crime against humanity of extermination, which includes “the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.<sup>311</sup>

Extermination as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of extermination prohibiting the intentional targeting of civilians within the framework of a large-scale or systematic attack under Article 442-1.2(2) of the Criminal Code of Ukraine. Note 2 to Article 442-1 defines extermination as “the deprivation of life of one or more persons by means of deliberately created living conditions aimed at the destruction of part of the population, including by deprivation of access to food or

<sup>311</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 7(1)(b), 7(2)(b). The crime against humanity of extermination was also prohibited by the UK, USA, France and the USSR in the aftermath of World War II. *See*, UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 (‘Nuremburg Charter’), Article 6(c); UN, International Military Tribunal for the Far East Charter (19 January 1946), TIAS 1589 (‘Tokyo Charter’), Article 5(c). *See also*, UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’) Article 5(b); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’) Article 3(b); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’) Article 2(b); Law 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, Official Gazette No. 27 (31 August 2015) (‘KSC & SPO Statute’), Article 13(1)(b); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 (‘ECCC Law’), Article 5.

medicine”. This definition appears to require the intent to destroy part of a population (“deprivation of life [...] aimed at the destruction of part of the population”), which is not required by the international crime of extermination as defined by the ICC. There is no specific intent to destroy required for the crime of extermination – the crime is satisfied where the perpetrator intended to kill the victim and was *aware* this took place within the context of mass killings.<sup>312</sup> This provision should be interpreted to align with the contextual elements and the specific elements of the crime against humanity of extermination contained in the Rome Statute and the ICC Elements of Crimes.

The elements of this crime are:<sup>313</sup>

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### **3.2.2.1 Element One: The Perpetrator Killed One or More Persons, Including by Inflicting Conditions of Life Calculated to Bring About the Destruction of Part of a Population**

To establish this element, practitioners must seek information demonstrating that one or more persons were killed by the perpetrator.

To establish that the perpetrator *killed or caused the death* of one or more persons, the evidence must demonstrate that: (i) a person is dead; and (ii) that there is a causal link between the perpetrator’s unlawful act or omission and that person’s death.<sup>314</sup> This is substantially similar to the first element of the crime against humanity of murder (Article 7(1)(a), *see* Section 3.2.1.1). Thus, the requirements to establish that one or more persons are dead, set out in that section, should be considered.

In addition to direct killing, extermination may also be committed by inflicting conditions of life calculated to bring about the destruction of part of a population. These conditions usually lead to a

<sup>312</sup> Rome Statute, Article 30(3).

<sup>313</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 7(1)(b).

<sup>314</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (‘Ongwen Trial Judgment’), para. 2696; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 (‘Bemba Trial Judgment’), paras 87-88; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014, (‘Katanga Trial Judgment’), paras 767-769; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, (‘Katanga & Chui Decision on the Confirmation of Charges’), para. 287; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Confirmation of the Charges, 15 June 2009 (‘Bemba Decision on the Confirmation of the Charges’), para. 132; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 (‘Karadžić Trial Judgment’), para. 446; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgment, 28 February 2005 (‘Kvočka et al. Appeal Judgment’), para. 261; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (‘Akayesu Trial Judgment’), para. 589.



slow death for the victim(s) over a certain period of time.<sup>315</sup> For example, practitioners should seek information showing that any of the following conditions have been imposed:<sup>316</sup>

- Deprivation of adequate food and water;
- Systematic expulsion of members of the group from their homes or deportation;
- Lack of proper accommodation;
- Lack of sufficient clothing, sanitation and hygiene;
- Excessive work or physical exertion;
- Denial of the right to medical services; and
- Conditions of detention, including severe overcrowding, deprivation of nourishment, and lack of access to medical care.

### **3.2.2.2 Element Two: The Conduct Constituted, or Took Place as Part of, a Mass Killing of Members of a Civilian Population**

In relation to the second element, practitioners should seek information to show that the killings constituted, or took place as part of, a mass killing of members of a civilian population.<sup>317</sup> In this respect, extermination differs from murder in that (i) it requires an element of mass destruction;<sup>318</sup> and (ii) it is directed against a population rather than individuals.<sup>319</sup>

Practitioners should seek information to show that the killing formed a part of an extermination campaign that involved large-scale killings.<sup>320</sup> The information must show that the relevant killings form part of the same operation, rather than an aggregate of unrelated and separate killings committed in different locations, by different perpetrators and over an extended period of time.<sup>321</sup>

While there is no minimum number of people who must have been killed,<sup>322</sup> the scale of the killing required for extermination must be substantial, and responsibility for a single or a limited number

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<sup>315</sup> *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Trial Judgment, 21 May 1999 ('*Kayishema & Ruzindana* Trial Judgment'), para. 116.

<sup>316</sup> ICC Elements of Crimes, fn. 4. See also, *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, paras 912, 918, 928; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment and Sentence, 6 December 1999, para. 52; *Kayishema & Ruzindana* Trial Judgment, paras 115-116; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 ('*Karadžić* Trial Judgment'), para. 547; *Prosecutor v. Stakić*, IT-97-24-T, Trial Judgment, 21 July 2003 ('*Stakić* Trial Judgment'), para. 517.

<sup>317</sup> *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 96.

<sup>318</sup> Trial Judgment, para. 591; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para. 890; *Prosecutor v. Ntakirutimana & Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, Appeal Judgment, ('*Ntakirutimana & Ntakirutimana* Appeal Judgment'), para. 516; *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Judgment, 27 September 2006 ('*Krajišnik* Trial Judgment'), para. 716.

<sup>319</sup> *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003 ('*Semanza* Judgment and Sentence'), para. 340; *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgment, 29 November 2002 ('*Vasiljević* Trial Judgment'), para. 227; *Akayesu* Trial Judgment, para. 591.

<sup>320</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) p. 188.

<sup>321</sup> *Karadžić* Trial Judgment, para. 484; *Prosecutor v. Tolimir*, IT-05-88/2, Appeal Judgment, 8 April 2015 ('*Tolimir* Appeal Judgment'), para. 147; *Prosecutor v. Karemera*, ICTR-98-44-A, Appeal Judgment, 29 September 2014, para. 661; *Prosecutor v. Bagosora et. al.*, ICTR-98-41-A, Appeal Judgment, 14 December 2001, para. 396.

<sup>322</sup> *Prosecutor v. Setako*, ICTR-04-81-T, Judgment and Sentence, 25 February 2010, para. 480.

of killings is insufficient.<sup>323</sup> Extermination has been found in relation to the killing of thousands of victims, as well as the killing of around 60 persons.<sup>324</sup>

Extermination is much broader in scope compared to the crime of genocide as it: (i) applies to situations where only some members of a group are killed but others are spared; and (ii) can be directed against a wider array of groups of individuals, covering not only national, ethnical, racial and religious groups,<sup>325</sup> but also political, social or linguistic groups and those based on their sexual orientation.<sup>326</sup>

### 3.2.2.3 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all crimes against humanity, and the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population?</b>	<ul style="list-style-type: none"> <li>• Did one or more persons die? If so, how many, when, where and how?</li> <li>• Has a corpse been recovered? If so, when, from where, how and by whom?</li> <li>• If no corpse has been recovered, when and where was the alleged victim(s) last seen?</li> <li>• Who was responsible for the death of the victim(s)?</li> <li>• What method(s) did the perpetrators use in killing the victim(s)?</li> <li>• Is there any evidence of indirect method(s) of causing death, such as infliction of certain conditions of life? If so, what conditions of life were inflicted upon the victim(s)?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that civilians were killed during an attack on a town by the armed forces.</li> <li>• A military report indicating that Ukrainian civilians died of starvation as a result of the siege maintained in Mariupol.</li> <li>• Forensic evidence showing that Ukrainian civilians were summarily executed and buried in mass graves.</li> <li>• Aerial photographs of a residential building that was destroyed in an attack, that housed hundreds of Ukrainian civilians, all of whom were killed in the blast.</li> <li>• An ICRC report describing the local population being denied access to food, water or medicine leading to the deaths of hundreds.</li> <li>• A report detailing that the majority of the bodies found in a mass grave were civilian Ukrainian men, children and women.</li> <li>• A UN report recording multiple allegations that a Russian armed groups moved from house to house in search of civilian men whom they then attacked and killed.</li> </ul>

<sup>323</sup> *Semanza Judgment and Sentence*, para. 340.

<sup>324</sup> *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Appeal Judgment, 4 December 2012, para. 537.

<sup>325</sup> These groups are expressly protected by the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) A/RES/260, Article 2.

<sup>326</sup> K. Ambos, *The Treatise on International Criminal Law: Volume II: The Crimes of Sentencing* (OUP 2014) pp. 84-85.

<p><b>Does the evidence show that the conduct constituted, or took place as part of, a mass killing of members of a civilian population?</b></p>	<ul style="list-style-type: none"> <li>• Were a large number of civilians killed? If so, how many?</li> <li>• When and where did the large-scale killings take place? Who perpetrated those killings?</li> <li>• Were the victims part of the civilian population?</li> <li>• Were the killings aimed at the collective group rather than individual victims?</li> <li>• Did the killing of one or more person by the perpetrator form a part of such large-scale killings?</li> <li>• Were the killings connected in terms of time, location, the identity of the victims and the manner in which they were targeted?</li> </ul>	<ul style="list-style-type: none"> <li>• Witnesses testifying from refugee camps that they had been forced to leave Mariupol and that many of their family had been killed because of continued aerial bombardment combined with a lack of food, water and medicine.</li> <li>• UN reports describing a pattern of the use of explosive weapons in a coordinated fashion across various cities, including Mariupol, Luhansk, Kremenchuk and Vinnytsia.</li> <li>• A combat report showing that 40 Ukrainian civilian men had been killed by the perpetrators in the context of similar killings having taken place over a week-long period.</li> <li>• Blindfolds and ligatures found on or with bodies in mass graves suggesting the victims were killed in mass executions rather than in combat.</li> <li>• Aerial reconnaissance photos confirming the presence of masses of civilians in locations prior to their execution.</li> <li>• A UN report indicating that over 500 civilian residents of a town had died from starvation within a period of a month.</li> <li>• A Commission Inquiry Report indicating that Russian soldiers went door to door in search of supporters of the Ukrainian government, whom they describe as “nazis” or “banderovtsy”.</li> </ul>
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Table 10: Article 7(1)(b) Cues for Practitioners

### 3.2.3 Crime against Humanity of Enslavement (Article 7(1)(c), Rome Statute)

Article 7(1)(c) of the Rome Statute prohibits enslavement,<sup>327</sup> which is defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.<sup>328</sup>

The crime against humanity of enslavement is not currently criminalised under Ukrainian law. However, the domestic crime of human trafficking is broad enough to cover much of the conduct prohibited by the crime against humanity of enslavement. This crime is covered by Article 149 of the Criminal Code of Ukraine (‘CCU’), which prohibits “[t]rafficking in human beings [...] for the purpose of exploitation [...]”. According to Note 1 to this provision, exploitation of human beings includes, *inter alia*, “forced labour or forced servicing, servitude or usages similar to servitude, servile status, involvement into indentured servitude”. Unlike the crime against humanity of enslavement, however, the CCU provision does not require the act of human trafficking to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element for crimes against humanity).

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of enslavement, which prohibits the intentional commission (infliction) of conversion to slavery or human trafficking committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(5) of the CCU. As such, Draft Bill 7290 will integrate both the contextual elements and the specific elements of the crime of enslavement as a crime against humanity contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>329</sup>

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>330</sup>

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<sup>327</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 7(1)(c). The crime against humanity of enslavement is also prohibited by the following international instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 5(c); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 3(c); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 2©; Convention to Suppress the Slave Trade and Slavery (1923), Article 2; Nuremburg Charter, Article 6(c); Tokyo Charter, Article 5(c); 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Article 1; ICCPR, Article 8; UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 (‘ECCC Law’), Article 5; Law 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, Official Gazette No. 27 (31 August 2015) (‘KSC & SPO Statute’), Article 13(1)(c).

<sup>328</sup> Rome Statute, Article 7(2)(c).

<sup>329</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (ICC Elements of Crimes’), Article 7(1)(c).

<sup>330</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

2. The conduct was committed as part of a widespread and systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### 3.2.3.1 *Element One: The Perpetrator Exercised any or all of the Powers Attaching to the Right of Ownership Over One or More Persons, such as by Purchasing, Selling, Lending or Bartering Such a Person or Persons, or by Imposing on them a Similar Deprivation of Liberty*

To establish this element, practitioners need to establish that the perpetrator purchased, sold, lent or bartered the victim, or imposed a similar deprivation of liberty on them.<sup>331</sup>

Exercising powers attaching to the right of ownership means the use, enjoyment and disposal of a person who is regarded as property, by placing them in a situation of dependence and depriving them of any form of autonomy.<sup>332</sup> This definition is broad and includes ‘chattel’ or ‘transactional’ slavery.<sup>333</sup> However, the enslavement does not need to involve a commercial transaction,<sup>334</sup> and includes imposing on the victim similar deprivations of liberty, such as by exacting forced labour or otherwise reducing them to a servile status,<sup>335</sup> or “trafficking in persons, in particular women and children”.<sup>336</sup> The imposition of ‘a similar deprivation of liberty’ may take many forms and “may cover situations where the victims have not been physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives”.<sup>337</sup>

There is no exhaustive list of situations or circumstances that reflect the exercise of the power of ownership.<sup>338</sup> However, a case-by-case assessment should be made, taking into account the following factors, among others:<sup>339</sup>

- detention or captivity and their respective duration;
- restrictions on any freedom of choice or movement;
- measures taken to prevent or deter escape;

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<sup>331</sup> ICC Elements of Crimes, Article 7(1)(c), Element 1.

<sup>332</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 (*Katanga Trial Judgment*), para. 975.

<sup>333</sup> R. Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 3<sup>rd</sup> Edition, CUP, 2015 (*Cryer et al. (2015)*), p. 473; *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002 (*Kunarac et al. Appeal Judgment*), para. 117.

<sup>334</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (*Ongwen Trial Judgment*), para. 2713; *Katanga Trial Judgment*, para. 976; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (*Ntaganda Trial Judgment*), para. 952; *Prosecutor v. Taylor*, SCSL-03-01-1281, Trial Judgment, 18 May 2012 (*Taylor Trial Judgment*), para. 420; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007 (*Brima et al. Trial Judgment*), para. 709.

<sup>335</sup> ‘Servile status’ is defined as a person in the condition or status resulting from any of the institutions or practices of slavery. See, 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Article 7(b).

<sup>336</sup> ICC Elements of Crimes, Article 7(1)(c), fn. 11.

<sup>337</sup> *Ongwen Trial Judgment*, para. 2713; *Ntaganda Trial Judgment*, para. 952; *Taylor Trial Judgment*, para. 420; *Brima et al. Trial Judgment*, para. 709. See also, *Katanga Trial Judgment*, para. 977.

<sup>338</sup> *Katanga Trial Judgment*, para. 975; *Ntaganda Trial Judgment*, para. 952; *Kunarac et al. Appeal Judgment*, para. 119; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009 (*Sesay et al. Trial Judgment*), para. 160.

<sup>339</sup> *Ongwen Trial Judgment*, para. 2712; *Katanga Trial Judgment*, para. 976; *Prosecutor v. Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001, paras 542-543; *Kunarac et al. Appeal Judgment*, paras 119, 121; *Sesay et al. Trial Judgment*, para. 160; *Taylor Trial Judgment*, para. 420; *Ntaganda Trial Judgment*, para. 952.

- the use of threats, force, or other forms of physical or mental coercion;
- forced labour or subjecting the person to servile status;
- the exertion of psychological pressure or control;
- the victim's vulnerability;
- the socioeconomic conditions in which the power is exerted;
- the nature of the physical environment;
- the assertion of exclusivity;
- the subjection to cruel treatment and abuse; or
- control of sexuality.

The subjective nature of the deprivation of liberty – i.e., the victim's “perception of his or her situation as well as his or her reasonable fear”<sup>340</sup> – is also relevant to a determination of whether the crime against humanity of enslavement has been established. However, despite being a potentially helpful evidentiary factor in determining whether an accused's actions amount to enslavement, the (non)consent of the victim is not an element of enslavement, which is, instead, exclusively concerned with the exercise of the rights of ownership over another person.<sup>341</sup>

There is no minimum period during which time the victim must be enslaved in order for an exercise of the power of ownership to amount to the crime against humanity of enslavement.<sup>342</sup> In addition, it is not a requirement of enslavement to prove that the perpetrator “intended to detain the victims under constant control for a prolonged period of time”.<sup>343</sup>

### 3.2.3.2 General Contextual and Mental Elements

Finally, practitioners should also seek information to establish the general contextual element common to all crimes against humanity, and the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator exercise any or all of the powers of ownership, such as by purchasing, selling, lending or bartering the victim(s)?</li> <li>• Did the perpetrator deprive the victim of their liberty, including freedom of movement and choice?</li> <li>• Did the perpetrator exact forced labour from the victim(s)?</li> <li>• Did the perpetrator reduce the victim to a servile status (i.e., through debt</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that Russian soldiers occupied her home, forced her to remain and reduced her to a servile status by requiring her to perform different domestic duties such as cooking, fetching water, washing and collecting wood.</li> <li>• A prisoner ledger of a detention centre with descriptions of the work performed by each detainee.</li> </ul>

<sup>340</sup> *Katanga* Trial Judgment, para. 977; *Taylor* Trial Judgment, para. 420.

<sup>341</sup> *Kunarac et al.* Appeal Judgment, paras 120-123.

<sup>342</sup> *Ongwen* Trial Judgment, para. 2714; *Kunarac et al.* Appeal Judgment, para. 121.

<sup>343</sup> *Kunarac et al.* Appeal Judgment, para. 122.



<b>imposing on them a similar deprivation of liberty?</b>	bondage, serfdom, forced marriage, child exploitation, etc.)? <ul style="list-style-type: none"> <li>• Did the perpetrator traffic the victim(s)?</li> <li>• What measures did the perpetrator put in place to deter the victim from escaping?</li> <li>• Was the victim particularly vulnerable?</li> <li>• Under what socioeconomic conditions did the perpetrator exercise the power of ownership over the victim?</li> </ul>	<ul style="list-style-type: none"> <li>• Documents indicating purchase or sale of the victim by the perpetrator.</li> <li>• Chains and other bondage equipment used by the perpetrator to restrict the freedom of movement of the victim(s).</li> <li>• Video footage of a market where victims were sold or purchased by the perpetrator in exchange for money or other goods.</li> <li>• A UN report indicating that detainees were subjected to forced labour.</li> </ul>
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Table 11: Article 7(1)(c) Cues for Practitioners

### 3.2.4 Crime against Humanity of Deportation and Forcible Transfer (Article 7(1)(d), Rome Statute)

Article 7(1)(d) of the Rome Statute prohibits deportation and forcible transfer of the population,<sup>344</sup> which occurs when persons are forcibly displaced by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law.<sup>345</sup>

The crime against humanity of deportation and forcible transfer is not currently criminalised under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) into the Criminal Code of Ukraine the crime against humanity of deportation (Article 442-1.1(2)) and forcible transfer (Article 442-1.1(3)) of the population. This includes the forced relocation or transfer (eviction) of one or more persons, in the absence of grounds provided by international law, from the area in which they were legally located to the territory of another state (deportation) or another area within the same state (forcible transfer). As such, Draft Bill 7290 will integrate both the contextual elements and the specific elements of the crime of deportation and forcible transfer as a crime against humanity contained in the ICC Rome Statute and Elements of Crimes.

<sup>344</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(d). The crime against humanity of deportation is also prohibited by the following international instruments: UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 ('Nuremberg Charter'), Article 6(c); UN, International Military Tribunal for the Far East Charter (19 January 1946), TIAS 1589 ('Tokyo Charter'), Article 5(c); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 5(d); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 3(d); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(d); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 5. Deportation or forcible transfer is also prohibited as a war crime under Article 8(2)(a)(vii) and Article 8(2)(b)(viii) of the Rome Statute.

<sup>345</sup> Rome Statute, Article 7(2)(d).

The elements of this crime are:<sup>346</sup>

1. The perpetrator deported or forcibly<sup>347</sup> transferred,<sup>348</sup> without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread and systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

#### **3.2.4.1 Element One: The Perpetrator Deported or Forcibly Transferred, without Grounds Permitted under International Law, One or More Persons to Another State or Location, by Expulsion or Other Coercive Acts**

##### **3.2.4.1.1 *Deportation or Forcible Transfer to Another State or Location, by Expulsion or Other Coercive Acts***

First, practitioners should seek information showing that one or more persons were *deported* to another State or *transferred* to another location within a State.<sup>349</sup> It must be established that one or more acts that the perpetrator performed produced the effect of deporting or forcibly transferring the victim.<sup>350</sup>

The deportation or transfer must be by expulsion or other coercive acts.<sup>351</sup> There must be a genuine lack of choice on the part of the individuals displaced.<sup>352</sup> While individuals may agree, or even request, to be removed from an area, this is insufficient if the consent was not given voluntarily or

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<sup>346</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7(1)(d).

<sup>347</sup> The term 'forcibly' is not restricted to physical force, but may include threat or force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.

<sup>348</sup> 'Deportation or forcibly transferred' is interchangeable with 'forcibly displaced'.

<sup>349</sup> The difference between deportation and forcible transfer is that deportation requires movement to another state. See, ICC-RoC46(3)-01, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 6 September 2018 ('ICC, 'Decision on Jurisdiction'), para. 55; *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgment, 22 March 2006 ('*Stakić* Appeal Judgment'), paras 289, 300; *Prosecutor v. Šešlj*, MICT-16-99-A, Appeal Judgment, 11 April 2018 ('*Šešlj* Appeal Judgment'), fn. 538.

<sup>350</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 ('*Ntaganda* Trial Judgment'), para. 1047; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges, 23 January 2012 ('*Ruto et al.* Decision on Confirmation of Charges'), para. 245; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment, 10 June 2010 ('*Popović et al.* Trial Judgment'), para. 893.

<sup>351</sup> ICC Elements of Crimes, Article 7(1)(d); *Stakić* Appeal Judgment, para. 279; *Prosecutor v. Krnojelac*, IT-97-25, Trial Judgment, 15 March 2002 ('*Krnojelac* Trial Judgment'), para. 475; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001 ('*Krstić* Trial Judgment'), para. 528.

<sup>352</sup> *Ntaganda* Trial Judgment, para. 1056; *Stakić* Appeal Judgment, para. 279; *Krnojelac* Trial Judgment, para. 475.

as a result of individual free will.<sup>353</sup> Only if the person genuinely wishes to leave would a displacement be considered lawful and thus absolve the perpetrator of criminal responsibility.<sup>354</sup>

To determine whether this element has been met, practitioners should consider the prevailing situation and atmosphere, as well as other relevant circumstances, such as the victims' vulnerability or the existence of a coercive environment (e.g., a rise in tension and fear coupled with an increase in military presence).<sup>355</sup> Practitioners should consider not only whether actual physical force was used, but also other means of coercion such as fear of violence, duress, detention, psychological oppression or abuse of power or taking advantage of a coercive environment.<sup>356</sup> "[V]arious types of conduct may qualify as 'expulsion or other coercive acts', including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting".<sup>357</sup> Other examples include imprisonment, ill-treatment or untenable living conditions.<sup>358</sup> Incidental displacement as a result of an entirely lawful attack, or collateral consequences of a lawful attack, does not amount to forcible transfer or displacement.<sup>359</sup>

#### 3.2.4.1.2 *Without Grounds Permitted under International Law*

Further, practitioners should consider whether the deportation or transfer occurred without grounds permitted under international law.<sup>360</sup>

During armed conflict, temporary displacement (or 'evacuation') of civilians for humanitarian or imperative military reasons is permitted,<sup>361</sup> provided those displaced persons are to be returned to their homes as soon as the situation allows.<sup>362</sup> In such situations, displaced persons must be returned to their homes as soon as the situation allows.<sup>363</sup> Although forcible removal for humanitarian reasons is justifiable in certain situations, it is not justified where the humanitarian crisis that caused the

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<sup>353</sup> *Ntaganda Trial Judgment*, para. 1056; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Judgment, 29 May 2013 ('*Prlić et al. Trial Judgment*'), para. 50; *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 ('*Karadžić Trial Judgment*'), para. 489; *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2005 ('*Naletilić & Martinović Trial Judgment*'), para. 519.

<sup>354</sup> *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2005 ('*Naletilić & Martinović Trial Judgment*'), para. 519.

<sup>355</sup> *Ntaganda Trial Judgment*, para. 1056; *Stakić Appeal Judgment*, para. 282; *Prosecutor v. Stakić*, IT-97-24-T, Trial Judgment, 21 July 2003, paras 85, 707; *Karadžić Trial Judgment*, para. 489; *Prosecutor v. Krnojelac* IT-97-25-A, Appeal Judgment, 17 September 2003, para. 229.

<sup>356</sup> ICC Elements of Crimes, Article 7(1)(d), fn. 12; *Naletilić & Martinović Trial Judgment*, para. 519; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001, paras 528-529.

<sup>357</sup> ICC, Decision on Jurisdiction, para. 61.

<sup>358</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, *Commentary*'), p. 347.

<sup>359</sup> *Ntaganda Trial Judgment*, para. 1056.

<sup>360</sup> *Popović et al. Trial Judgment*, para. 891; *Krajišnik Trial Judgment*, para. 723; *Ruto et al. Decision on Confirmation of Charges*, para. 243.

<sup>361</sup> Fourth Geneva Convention, Article 49; *Karadžić Trial Judgment*, para. 492; *Prlić Trial Judgment*, para. 53; *Popović et al. Trial Judgment*, para. 903 (citing *Stakić Appeal Judgment*, para. 287).

<sup>362</sup> Fourth Geneva Convention, Article 49(2); *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Judgment, 30 May 2013, para. 994; *Krajišnik Trial Judgment*, para. 725; *Popović et al. Trial Judgment*, para. 901.

<sup>363</sup> Fourth Geneva Convention, Article 49(2); *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Judgment, 30 May 2013, para. 994; *Krajišnik Trial Judgment*, para. 725; *Popović et al. Trial Judgment*, para. 901.

displacement is itself the result of the perpetrator's own unlawful activity.<sup>364</sup> In addition, it is unlawful to use so-called 'imperative military reasons' as a pretext to 'evacuate' a civilian population from an area or State and, subsequently, seize control over that territory.<sup>365</sup>

During peacetime, deportations or transfers that are necessary to protect national security, public order or public health and morals, or the rights and freedoms of others may be permitted.<sup>366</sup> Such displacement may also be necessary for humanitarian reasons in case of epidemics or natural disasters unless the perpetrator's own activity caused the humanitarian crisis.<sup>367</sup>

#### **3.2.4.2 Element Two: Such Person or Persons were Lawfully Present in the Area from which they were so Deported or Transferred**

This element requires practitioners to demonstrate that the victims were lawfully (under both domestic and international law) residing in the territory from which they were deported or forcibly transferred.<sup>368</sup>

Nationals of a State have a right to reside in the territory of their own State.<sup>369</sup> This requirement does not, however, mean that the victims must demonstrate residency as a legal standard.<sup>370</sup> This element will be satisfied unless the relevant persons were occupying houses or premises unlawfully.<sup>371</sup>

#### **3.2.4.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established the Lawfulness of such Presence**

The third element requires the perpetrator to have been aware of the facts that established the lawfulness of the victims' presence in the area from where they were transferred or deported. However, the perpetrator does not need to have made any legal determination concerning the lawfulness of the victim's presence or that the perpetrator was aware that it was lawful.<sup>372</sup> The fact that the perpetrator was aware that the displaced persons were residing in the relevant territory for a prolonged period could be sufficient.

#### **3.2.4.4 General Contextual and Mental Elements**

Finally, practitioners should seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

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<sup>364</sup> *Karadžić Trial Judgment*, para. 492; *See also, Popović et al. Trial Judgment*, para. 903 (citing *Stakić Appeal Judgment*, para. 287).

<sup>365</sup> *Karadžić Trial Judgment*, para. 492; *Popović et al. Trial Judgment*, para. 901; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005 ('*Blagojević & Jokić Trial Judgment*'), para. 597.

<sup>366</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'), Article 12(3).

<sup>367</sup> *Popović et al. Trial Judgment*, para. 903 (citing *Stakić Appeal Judgment*, para. 287); ICCPR, Article 12(3).

<sup>368</sup> *Popović et al. Trial Judgment*, para. 900; *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Judgment, 12 December 2012, para. 797.

<sup>369</sup> ICCPR, Article 12.

<sup>370</sup> *Popović et al. Trial Judgment*, para. 900.

<sup>371</sup> *Popović et al. Trial Judgment*, para. 900; *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Judgment, 23 February 2011, paras 1616, 1640.

<sup>372</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, *Commentary*'), p. 265.

Element	Cues for Practitioners	Examples of Evidence
<p><b>Does the evidence show that one or more acts of the perpetrator caused the deportation or forcible transfer of the victim(s)?</b></p>	<ul style="list-style-type: none"> <li>• Were one or more persons displaced to another State or transferred to another location within a State?</li> <li>• What were the circumstances of such displacement (when, where, who, etc.)?</li> <li>• Were the victims expelled by the perpetrator?</li> <li>• Did the perpetrator cause the displacement through physical violence or other coercive acts such as fear of violence, duress, detention, psychological oppression, or abuse of power or taking advantage of a coercive environment?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they decided to leave after soldiers attacked their town and were indiscriminately shelling the inhabitants.</li> <li>• An order from a Russian army commander that all civilians in Mariupol must be ‘evacuated’.</li> <li>• Photographs of people at a train station fleeing a location that had been subjected to heavy shelling.</li> <li>• Videos of large numbers of individuals crossing the border between two States.</li> <li>• A report by an international organisation on the forcible transfer of civilians from Mariupol to Russian-occupied areas of Ukraine and Russia. These transfers occurred in a coercive environment due to the involvement of the military, the fact that Mariupol had been under siege and the fact that, where the civilians were willing to leave, they were nevertheless prevented from going to Ukrainian government-held areas.</li> <li>• Satellite imagery showing a long line of what looks like civilian vehicles being escorted by military cars, trucks and tanks, moving from Ukrainian territory towards the Russian border.</li> </ul>
<p><b>Does the evidence show that the displacement was without grounds permitted under international law?</b></p>	<ul style="list-style-type: none"> <li>• Were there any grounds in international law permitting the forcible transfer or deportation of the relevant person(s)?</li> <li>• Were the victims displaced because of security or imperative military reasons? If so, were the relocated persons able to return to their homes as soon as the crisis was resolved, or hostilities ended?</li> <li>• Were the victims displaced because of any other humanitarian reason, which were not caused by the actions of the perpetrator?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they were displaced because members of their family had been arbitrarily arrested and detained by soldiers and that there were no military reasons for their departure.</li> <li>• A military analysis report showing there were no imperative military reasons for the displacement.</li> <li>• A UN report indicating that displacement was caused by soldiers intimidating the local population, and that there were no security, humanitarian or imperative military reasons.</li> <li>• A report regarding the ‘evacuation’ of civilians by Russian forces from Mariupol in response to a siege implemented by the Russian forces themselves.</li> </ul>
<p><b>Does the evidence show that the person</b></p>	<ul style="list-style-type: none"> <li>• Was the displaced person lawfully present in the relevant</li> </ul>	<ul style="list-style-type: none"> <li>• A victim of deportation describing the circumstances surrounding their</li> </ul>



<b>or persons were lawfully present in the area?</b>	<p>area/territory under national legislation?</p> <ul style="list-style-type: none"> <li>Was the displaced person lawfully present in the area under international law?</li> </ul>	<p>presence in the location, including the fact that they hold Ukrainian citizenship.</p> <ul style="list-style-type: none"> <li>Residency permits, passports and identification documents proving that the victims were lawfully residing in Ukraine when they were deported.</li> <li>Videos and photographs depicting the perpetrators evicting a large number of individuals from their homes (which they had been living in for a prolonged period).</li> <li>Reports from international organisations or NGOs describing the lawful presence of the displaced persons.</li> </ul>
<b>Does the evidence show that the perpetrator was aware of the factual circumstances that established the lawfulness of such presence?</b>	<ul style="list-style-type: none"> <li>Are there circumstances surrounding the commission of the crime which indicate that the perpetrator was aware of the victim's lawful presence?</li> <li>Did the perpetrator indicate they knew of the lawfulness of the presence of the victim?</li> <li>Did the perpetrator know that the victims had been present in the area for a prolonged period?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that it was common knowledge that their community have lived in the area for generations.</li> <li>A video of a soldier saying that "people were fleeing their homes".</li> <li>Media reports that residents of Mariupol were being forcibly transferred across Ukraine into Russia and Russian-occupied territories.</li> </ul>

Table 12: Article 7(1)(d) Cues for Practitioners

### 3.2.5 Crime against Humanity of Imprisonment (Article 7(1)(e), Rome Statute)

Article 7(1)(e) of the Rome Statute prohibits the crime against humanity of imprisonment or other severe deprivation of physical liberty in a manner that violates fundamental rules of international law.<sup>373</sup>

The crime against humanity of imprisonment is not currently criminalised under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of illegal imprisonment under Article 442-1.1(7) of the Criminal Code of Ukraine. As such, Draft Bill 7290 will integrate

<sup>373</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(e). Imprisonment is also prohibited as the war crime of unlawful confinement under Article 8(2)(a)(vii) and Article 8(2)(a)(vi) of the Rome Statute. The crime against humanity of imprisonment is also prohibited by the following international instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 5(e); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 3(e); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(e); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 5.



both the contextual elements and the specific elements of the crime of deportation and forcible transfer as a crime against humanity contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>374</sup>

1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law;
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

#### ***3.2.5.1 The Perpetrator Imprisoned One or More Persons or Severely Deprived One or More Persons of Physical Liberty***

To satisfy this element, practitioners must prove that the perpetrator imprisoned or otherwise severely deprived one or more persons of physical liberty. ‘Imprisonment’ under this provision is to be understood as ‘arbitrary detention’, which means that an individual was deprived of liberty without due process of law (discussed further under Element Two, below).<sup>375</sup> Other deprivations of physical liberty, which must be considered ‘severe’ to satisfy this element, may include, for example, house arrest, restriction to a closed city, or similarly severe restrictions, including internment in concentration or detention camps or other forms of long-term detention.<sup>376</sup>

To establish that a deprivation of liberty was sufficiently severe so as to fall within the ambit of this provision, practitioners may consider a number of indicative factors, such as:<sup>377</sup>

- (i) whether the detainee was subjected to torture or other cruel, inhuman or degrading treatment, including crimes of sexual violence, or other intimidation;
- (ii) whether the initial arrest was lawful (e.g., whether it was based on a valid warrant of arrest, whether the detainee was informed of the reasons for their detention, whether the detainee

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<sup>374</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (ICC Elements of Crimes), Article 7(1)(e).

<sup>375</sup> *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgment, 26 February 2001 (‘Kordić & Čerkez Trial Judgment’), para. 302. Note that a deprivation of liberty may still be considered arbitrary under international law, even if it is in accordance with national law. See, O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (‘Triffterer & Ambos, Commentary’), p. 199.

<sup>376</sup> *Kordić & Čerkez Trial Judgment*, para. 299; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Judgment, 29 May 2013 (‘Prlić et al. Trial Judgment’), para. 473; *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000 (‘Blaškić Trial Judgment’), paras 684, 691, 700; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Judgment, 25 February 2004 (‘Ntagerura et al. Trial Judgment’), para. 702.

<sup>377</sup> *Kordić & Čerkez Trial Judgment*, paras 592, 609, 623, 625, 792-793; *Prosecutor v. Kordić and Čerkez*, ICTY-95-14/2A, Appeal Judgment, 17 December 2004, paras. 592-594, 605, 610; *Prlić et al. Trial Judgment*, para. 473; *Blaškić Trial Judgment*, para. 700; *Ntagerura et al. Trial Judgment*, para. 702. See also, Triffterer & Ambos, *Commentary*, p. 202.

was ever formally charged and whether the detainee was informed of any procedural rights);

- (iii) the duration of the deprivation of liberty;
- (iv) whether the detention was secret;
- (v) whether the detainee was cut off from the outside world; and/or
- (vi) whether the detention was part of a series of repeated detentions.

### **3.2.5.2 *The Gravity of the Conduct was Such That it Violated Fundamental Rules of International Law***

Second, practitioners must establish that this detention or deprivation of liberty was arbitrary<sup>378</sup> and that this arbitrary detention was sufficiently grave as to violate fundamental rules of international law. Detention will be arbitrary under international law when:<sup>379</sup>

- (i) there is no legal basis for the deprivation of liberty;
- (ii) the deprivation of liberty results from the exercise of specified rights and freedoms (such as the rights to freedom of speech, conscience, assembly, association and movement); or
- (iii) the total or partial non-observance of international human rights norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty or imprisonment an arbitrary character.

### **3.2.5.3 *The Perpetrator was Aware of the Factual Circumstances Establishing the Gravity of the Conduct***

Practitioners must also establish that the perpetrator was aware of the factual circumstances that established the gravity of the conduct. This element is focused on awareness of the factual circumstances that established the gravity of the conduct, and it is not necessary that the perpetrator made any legal evaluation that the imprisonment was in violation of fundamental rules of international law.<sup>380</sup>

### **3.2.5.4 *General Contextual and Mental Elements***

Finally, practitioners will also have to satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the perpetrator knew or intended the conduct to be part of this attack). Additionally, they must satisfy the mental elements (Article 30) that accompany the physical elements of the crime (i.e., that the perpetrator imprisoned or severely deprived of

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<sup>378</sup> *Kordić & Čerkez Trial Judgment*, paras 299, 302; *Krnojelac Trial Judgment*, para. 113. *See also*, Triffterer & Ambos, *Commentary*, p. 201. For this reason, arbitrary imprisonment will not include lawful deprivations of liberty, including 'lawful arrest, conviction following trial, lawful deportation or extradition procedures, quarantine, and, during armed conflict, assigned residence, internment on security grounds and internment of prisoners-of-war'. *See*, Cryer *et al* (2015), p. 475.

<sup>379</sup> Report of UN Working Group on Arbitrary Detention, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment - Report of the Working Group on Arbitrary Detention, Annex I: Revised Methods of Work' (19 December 1997) E/CN.4/1998/44, para. 8; *Prlić et al. Trial Judgment*, paras 471, 473; *Ntagerura et al. Trial Judgment*, para. 702.

<sup>380</sup> *See*, M. Klamberg and J. Nilsson (eds), *Commentary on the Law of the International Criminal Court – The Rome Statute*, Article 7(1)(e).

physical liberty one or more persons in a manner that violates fundamental rules of international law). These elements are discussed in Sections 3.1 and 3.3.

Element	Cues for Practitioners	Examples of Evidence
<p><b>Does the evidence show that the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty?</b></p>	<ul style="list-style-type: none"> <li>• Was the victim arrested? What were the circumstances of the arrest?</li> <li>• Was the victim abducted? What were the circumstances of the abduction?</li> <li>• Was the victim detained? For how long where they detained?</li> <li>• Was the victim subjected to torture or other cruel, inhuman or degrading treatment in detention?</li> <li>• Was the victim detained lawfully (i.e., based on a warrant of arrest, provided reasons for their detention, formally charged informed of their procedural rights)?</li> <li>• Was the victim arrested and detained lawfully, but then subsequently disappeared while in detention?</li> </ul>	<ul style="list-style-type: none"> <li>• Lists of persons detained in a prison showing that the victim was detained at the time they were tortured.</li> <li>• A photograph of a person placed in handcuffs by the perpetrator.</li> <li>• Medical reports describing the physical injuries suffered by the victim while in detention, such as cuts, bruises, broken bones and internal bleeding.</li> <li>• A victim testifying that she was detained in a Russian detention centre where she was tortured.</li> <li>• Video evidence of demonstrators being cornered and detained by the Russian forces.</li> <li>• Satellite imagery showing a system of 21 detention sites in the Donetsk region that the Russian military and Russian-backed separatists are using to detain and interrogate Ukrainian civilians and prisoners of war.</li> <li>• NGO reports on a “filtration” system implemented by the Russian forces whereby civilian evacuees are transferred to Russian-controlled areas of Ukraine and arbitrarily detained in detention centres where they are interrogated and tortured.</li> </ul>
<p><b>Does the evidence show that the perpetrator was aware of the factual circumstances that established the gravity of the act?</b></p>	<ul style="list-style-type: none"> <li>• Are there circumstances surrounding the imprisonment which indicate that the perpetrator was aware of the factual circumstances that established the gravity of the act?</li> <li>• Did the perpetrator personally subject the victim to imprisonment or a deprivation of liberty?</li> <li>• Was the perpetrator present when the victim was imprisoned or deprived of their liberty?</li> <li>• Did the perpetrator interact with the victims or clearly see who they were?</li> </ul>	<ul style="list-style-type: none"> <li>• Witnesses testifying that the perpetrator was present at the scene when the victim was grabbed off the street and taken to an unknown location.</li> <li>• A victim testifying that he was imprisoned by the Russian forces in inhumane living conditions due to, <i>inter alia</i>, over crowding and lack of adequate food, water and medicine, and the repeated torture he and other detainees endured.</li> <li>• Military diaries indicating that the perpetrator attended the interrogation of the detainees where they were subjected to torture.</li> <li>• Video of a soldier forcing detainees to stand in stress positions and subjecting them to beatings.</li> </ul>

		<ul style="list-style-type: none"> <li>Official military documents indicating that the perpetrator was the commander of the prison camp where the victim was imprisoned.</li> </ul>
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Table 13: Article 7(1)(e) Cues for Practitioners

### 3.2.6 Crime against Humanity of Torture (Articles 1 and 2, Convention against Torture; Article 7(1)(f), Rome Statute)

International instruments prohibit the crime against humanity of torture.<sup>381</sup> However, the elements of the crime against humanity of torture differ between the Convention against Torture ('CAT'), the statutes of the International Criminal Tribunal for the former Yugoslavia ('ICTY')/the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Court ('ICC'). Accordingly, for the reasons discussed below, this section will rely on the definition of the crime against humanity of torture as found to be reflective of customary international law by the ICTY and the ICTR. This definition also most closely aligns with the definition of torture contained in Article 127 of the Criminal Code of Ukraine ('CCU').

Currently, Ukrainian legislation does not criminalise the crime against humanity of torture. However, this broadly correlates with the ordinary crime of torture under Article 127 of the CCU, which prohibits the "wilful causing of severe physical pain or physical or mental suffering by way of battery, martyrizing or other violent actions" for the purpose of inducing the victim or any other person to commit involuntary actions or the purpose of punishing him/her or any other person, as well as for the purpose of intimidation and discrimination of him/her or other person. The crime of torture under the CCU correlates to the crime against humanity of torture under customary international law as it requires the wilful (i.e., intentional) infliction of physical or mental pain or suffering for a specific purpose. However, the ordinary crime of torture does not require the act of torture to be committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element of crimes against humanity).

Additionally, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of torture committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(8) of the CCU. Note 5 to Article 442-1 defines torture as "intentionally causing severe physical pain or

<sup>381</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 1 and 2; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(f); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 5(f); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 3(f). The crime against humanity of torture is also prohibited in the following international legal instruments: UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(f); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 5; Law 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, Official Gazette No. 27 (31 August 2015) ('KSC & SPO Statute'), Article 13(1)(f). In addition, the following human rights treaties prohibit torture: UN Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment; ICCPR, Articles 4, 7; European Convention on Human Rights (ECHR), Article 3. Torture is also prohibited as a war crime under Article 8(2)(a)(ii) and Article 8(2)(c)(i) of the Rome Statute.

physical or moral suffering to a person”. Accordingly, Draft Bill 7290 will integrate both the contextual elements and the specific elements of the crime of torture as a crime against humanity contained in the international instruments.

The CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any person based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>382</sup>

Early in its jurisprudence, the ICTY Trial Chamber undertook a comprehensive study of the crime of torture and adopted an authoritative definition of torture as a crime against humanity, which it indicated is reflective of customary international law.<sup>383</sup> This definition is set out as follows:<sup>384</sup>

1. The perpetrator inflicted, by act or omission, severe pain or suffering, whether physical or mental.
2. Such pain or suffering was inflicted for the purpose of obtaining information or a confession, or punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Accordingly, while a portion of this definition of the crime against humanity of torture followed the definition contained in the CAT, both the ICTY and the ICTR found that the requirement that the act of torture was “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” was not reflective of customary international law, and therefore did not include this as an element of the crime against humanity of torture.<sup>385</sup> In

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<sup>382</sup> Convention Against Torture, Article 1.

<sup>383</sup> *Prosecutor v. Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001 (*Kunarac Trial Judgment*), para. 497; *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002 (*Kunarac et al. Appeal Judgment*), para. 142. See also, *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001 (*Kvočka et al. Trial Judgment*), para. 141; *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Judgment, 15 May 2003 (*Semanza Trial Judgment*), para. 343; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Judgment, 25 February 2004, para. 703.

<sup>384</sup> *Kunarac et al. Appeal Judgment*, para. 142.

<sup>385</sup> Note that, initially, the ICTY in the *Furundzija* Appeal Judgment (para. 11) said that the definition of torture in the Torture Convention, including the public official requirement, reflected customary international law. However, this was reversed by the ICTY in the *Kunarac et al. Appeal Judgment* (para. 146) where it was explained that the public official requirement

addition, neither the ICTY nor the ICTR included the requirement that an act of torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”,<sup>386</sup> which is required by the CAT and the Rome Statute.<sup>387</sup>

The definition of the crime against humanity of torture contained in the ICC Elements of Crimes requires that: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) such person or persons were in the custody or under the control of the perpetrator; and (iii) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.<sup>388</sup> Accordingly, while Element (i) of the ICC’s definition is also found in the customary international law definition of torture as a crime against humanity, as defined by the ICTY and ICTR, Elements (ii) and (iii) of the ICC’s definition are not considered part of the customary international law definition.<sup>389</sup>

Accordingly, the elements set out in this section are those contained in the CAT that have been found by the ICTY and ICTR to reflect customary international law.<sup>390</sup> As customary international law is binding on Ukraine,<sup>391</sup> prosecutors should ensure that the evidence meets each of the following elements. In addition, as seen above, the CCU’s definition of torture contained in Article 127 broadly correlates with the customary international law definition of torture.

### **3.2.6.1 Element One: The Perpetrator Inflicted, by Act or Omission, Severe Pain or Suffering, whether Physical or Mental**

The starting point of proving torture is to establish that one or more persons have been subjected to severe pain or suffering. Such pain or suffering can be caused either by an act or omission by the

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was not a requirement outside the framework of the Torture Convention. This approach was affirmed by the ICTY in the *Kvočka et al.* Appeal Judgment (para. 284) and by the ICTR in the *Semanza* Appeal Judgment (para. 248).

<sup>386</sup> See e.g., *Kunarac et al.* Appeal Judgment, para. 142; *Kvočka et al.* Trial Judgment, para. 141; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (*Akayesu* Trial Judgment), paras 593-594; *Semanza* Trial Judgment, para. 343.

<sup>387</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1; Rome Statute, Article 7(2)(e); International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (ICC Elements of Crimes’), Article 7(1)(f), Element Three.

<sup>388</sup> ICC Elements of Crimes, Article 7(1)(f).

<sup>389</sup> See, e.g., *Kunarac* Trial Judgment, para. 482-484, 497; *Kunarac* Appeal Judgment, paras 142-144; O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 271; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn, CUP 2015), p. 251; Association for the Prevention of Torture and Center for Justice and International Law, ‘Torture in International Law: A guide to jurisprudence’ (2008), p. 170. See also, Convention Against Torture, Article 1(2).

<sup>390</sup> *Kunarac et al.* Appeal Judgment, para. 146; *Prosecutor v. Furundzija*, IT-95-17/1-A, Appeal Judgment, 21 July 2000 (*Furundzija* Appeal Judgment), para. 111; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 (*Delalić* Trial Judgment), para. 459; *Semanza* Appeal Judgment, para. 248; *Akayesu* Trial Judgment, para. 593.

<sup>391</sup> Customary international law is a set of rules binding on all States derived from the consistent conduct of States (‘State practice’) acting out of the genuine belief that the law – as opposed to, e.g., courtesy or political advantages – required them to act that way (‘*opinio juris*’). *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, paras 71-74, 77. See also, M. Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019), p. 46.



perpetrator.<sup>392</sup> The suffering may be either physical or mental, and it is not necessary to prove that the pain or suffering involved specific physical injury, impairment of a bodily function or death.<sup>393</sup>

The following types of acts have been found to constitute torture before international tribunals:

- **Physical suffering:** beating; burning; mutilation; stabbing; hanging; holding a person in a painful position; electrocution; excessive exposure to heat or cold; being starved; rape and other sexual violence.<sup>394</sup>
- **Mental suffering:** psychological abuse; placing an individual in an extremely stressful situation, such as confinement, isolation or darkness; threatening a person's well-being or that of their family; forcing victims to watch executions of others or bury the bodies of their neighbours and friends; sleep deprivation.<sup>395</sup>

While there is no requirement for the pain or suffering to be visible or permanent,<sup>396</sup> it must meet a certain level of severity which results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life, going beyond temporary unhappiness, embarrassment or humiliation.<sup>397</sup> The severity requirement implies an "important degree of pain and suffering [which] may be met by a single act or by a combination of acts when viewed as a whole".<sup>398</sup>

To assess the severity of the pain and suffering, practitioners should consider the following:<sup>399</sup>

- The nature, duration and context of the infliction of pain;
- The premeditation and institutionalisation of the ill-treatment;
- The manner and method used by the perpetrator to cause the pain;
- The victim's age, sex and state of health;
- The position of inferiority of the victim;
- The physical and mental effects of the treatment on the victim; and
- The specific social, cultural and religious background of the victim.

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<sup>392</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('Ongwen Trial Judgment'), para. 2700; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 ('Delalić Trial Judgment'), para. 468.

<sup>393</sup> *Ongwen Trial Judgment*, para. 2701.

<sup>394</sup> *Ongwen Trial Judgment*, paras 2984-2985, 3027-3028, 3073; *Delalić Trial Judgment*, paras 481-486, 937-943, 963-965, 970-974; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 ('Akayesu Trial Judgment'), para. 597; *Prosecutor v. Brdanin*, IT-99-36-A, Appeal Judgment, 3 April 2007, para. 257; *Kunarac et al.* Appeal Judgment, paras 150-151; *Semanza Trial Judgment*, paras 170, 209, 213, 486, 586.

<sup>395</sup> *Delalić Trial Judgment*, paras 938-942, 958-964, 993-998; *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgment, 21 July 2000, para. 113; *Kunarac et al.* Appeal Judgment, paras 150-151.

<sup>396</sup> *Ongwen Trial Judgment*, para. 2703; *Kvočka et al.* Trial Judgment, para. 148; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgment, 30 November 2005 ('Limaj et al. Trial Judgment'), para. 236.

<sup>397</sup> *Ongwen Trial Judgment*, para. 2701; *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2005, para. 342; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Trial Judgment, 27 September 2007 ('Mrkšić et al. Trial Judgment'), para. 514; *Kvočka et al.* Trial Judgment, para. 149; *Limaj Trial Judgment*, para. 236.

<sup>398</sup> *Ongwen Trial Judgment*, para. 2701.

<sup>399</sup> *Limaj Trial Judgment*, para. 237; *Mrkšić et al.* Trial Judgment, para. 514; *Prosecutor v. Milorad Krnojelac*, IT-97-25, Trial Judgment, 15 March 2002, para. 182; *Prosecutor v. Haridanaj et al.*, IT-04-84 bis-T, Trial Judgment, 29 November 2012, para. 417; *Kvočka et al.* Trial Judgment, para. 143.

### 3.2.6.2 *Element Two: Such Pain or Suffering was Inflicted for the Purpose of Obtaining Information or a Confession, or Punishing, Intimidating or Coercing the Victim or a Third Person, or Discriminating, on Any Ground, Against the Victim or a Third Person*

The second element requires practitioners to show that the perpetrator inflicted the pain or suffering in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person (i.e., for a prohibited purpose).<sup>400</sup> Similarly, as discussed above, Article 127 of the CCU also requires the torture to have been committed for a prohibited purpose. This list of prohibited purposes is non-exhaustive.<sup>401</sup> For example, “humiliating the victim” has also been considered to be a prohibited purpose.<sup>402</sup>

In addition, there is no requirement that the act of torture must be perpetrated *solely* for a prohibited purpose.<sup>403</sup> This means that, provided that one of the prohibited purposes is fulfilled, it is immaterial if the motivation behind the conduct was personal, such as sexual gratification in the case of rape as a method of torture.<sup>404</sup>

### 3.2.6.3 *General Contextual and Mental Elements*

Finally, practitioners should seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator inflicted, by act or omission, severe pain or suffering, whether physical or mental?</b>	<ul style="list-style-type: none"> <li>Was one or more persons subjected to pain or suffering by the perpetrator?</li> <li>What were the circumstances surrounding the infliction of the pain/suffering, i.e., the method used to cause the pain or suffering, its context, duration and location?</li> <li>What kind of pain/suffering did the perpetrator inflict on the victim? Physical or mental?</li> <li>What was the gender/age/physical condition of the victim? Did they have any characteristics (child, elderly, pregnant, disabled, etc.) that made them particularly vulnerable?</li> <li>Did the infliction of pain/suffering cause any peculiar harm to the victim</li> </ul>	<ul style="list-style-type: none"> <li>The testimony of victims who survived imprisonment in a Russian detention centre where they were waterboarded, beat with rifle butts or batons, given electric shocks with tasers, raped, and made to suffer prolonged exposure to the cold.</li> <li>A victim testifying that he was forced to watch a female friend of his being subjected to sexual attack and this caused him severe mental suffering.</li> <li>Medical reports describing the physical injuries suffered by the victim, such as cuts, bruises, broken bones and internal bleeding, as a result of a beating.</li> <li>Weapons or tools used to inflict pain (such as batons, knives and other</li> </ul>

<sup>400</sup> *Kunarac Trial Judgment*, para. 497; *Kunarac et al. Appeal Judgment*, para. 142; *Prosecutor v. Martić*, IT-95-11-T, Trial Judgment, 12 June 2007 (*‘Martić Trial Judgment’*), para. 74.

<sup>401</sup> *Delalić Trial Judgment*, para. 470; *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004 (*‘Brdanin Trial Judgment’*), para. 487; *Martić Trial Judgment*, para. 77.

<sup>402</sup> *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 162.

<sup>403</sup> *Delalić Trial Judgment*, para. 470; *Brdanin Trial Judgment*, para. 487; *Martić Trial Judgment*, para. 77; *Karadžić Trial Judgment*, para. 508.

<sup>404</sup> *Delalić Trial Judgment*, paras 470-471; *Kunarac et al. Appeal Judgment*, para. 153; *Brdanin Trial Judgment*, para. 487.

	<p>due to their social, cultural or religious background?</p> <ul style="list-style-type: none"> <li>• Did the harm suffered by the victim have a negative and long-term effect on their ability to lead a normal life?</li> </ul>	<p>instruments) collected from the scene where the torture was conducted.</p> <ul style="list-style-type: none"> <li>• Video or photographic evidence of victims being forced to stand in a stress position and being beaten by Russian soldiers in detention centres.</li> <li>• Investigative and news reports of the system of torture chambers set up by Russian forces in Kherson, targeting those perceived as being pro-Ukrainian, subjecting them to physical beatings, electric shocks, waterboarding and forcing them to learn and recite pro-Russian propaganda.</li> </ul>
<p><b>Does the evidence show that the pain or suffering was inflicted for the purpose of obtaining information or a confession, or punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person?</b></p>	<ul style="list-style-type: none"> <li>• What were the circumstances surrounding the incident?</li> <li>• What was the purpose behind the infliction of mental or physical pain or suffering?</li> <li>• Was the victim: interrogated, questioned or forced to make a confession?</li> <li>• Does the nature of the pain or suffering indicate it was used for the purposes of punishment, intimidation, humiliation, etc?</li> <li>• Was the pain or suffering inflicted in an attempt to coerce the victim?</li> <li>• Did the perpetrators display an intent to discriminate against the victim?</li> <li>• Was the victim insulted or humiliated in any way while being tortured?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they were beaten and waterboarded by Russian soldiers for hours, questioned about their affiliation with the Ukrainian military and asked to provide details of the location of the Ukrainian armed forces.</li> <li>• A witness testifying that she was stripped naked, sexually abused and beaten in front of soldiers while they taunted and humiliated her.</li> <li>• Military diaries detailing the interrogation of a victim during which they were tortured in order to obtain information.</li> <li>• Media investigations reporting on abusive interrogations of political opponents which employ beatings, sleep deprivation and waterboarding. A photograph showing the victim stripped naked in front of an audience (indicative of humiliation).</li> <li>• A UN reports indicating that torture was used by Russian forces alongside long interrogation sessions to: obtain information about the Ukrainian armed forces, extract confessions, force victims to cooperate, or inflict punishments. Detainees were referred to as “nazis”, “fascists”, and “terrorists”, and forced to undergo “denazification sessions” consisting of severe beatings.</li> <li>• An NGO report indicating that evacuees who had been deported from Mariupol to Russian-controlled areas of Ukraine were subjected to intense questioning</li> </ul>

		and beatings, particularly those perceived as being affiliated with the Ukrainian military.
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Table 14: Article 7(1)(f) Cues for Practitioners

### 3.2.7 Crime against Humanity of Rape (Article 7(1)(g)-1, Rome Statute)

Article 7(1)(g) of the Rome Statute prohibits the crime against humanity of rape when committed in the context of a widespread and systematic attack on civilians.<sup>405</sup>

Rape as a crime against humanity is not currently prohibited under Ukrainian law. This conduct is, however, covered by the ordinary crime of rape under Article 152 of the Criminal Code of Ukraine ('CCU'), which prohibits "[c]ommitting sexual acts involving vaginal, anal or oral penetration into the body of another person using the genitals or any other item, without the voluntary consent of the victim (rape)". Unlike the crime against humanity of rape, however, the CCU provision does not require the act of rape to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of rape under common Article 442-1.1(4) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the crime against humanity of rape contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime:<sup>406</sup>

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

<sup>405</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(g). The crime against humanity of rape is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 5 (g); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 3(g); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(g); and the UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 5. Rape is also prohibited as a war crime under Rome Statute, Articles 8(2)(b)(xxii) and 8(2)(c)(vi).

<sup>406</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7(1)(g)-1.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### 3.2.7.1 *Element One: The Perpetrator Invaded the Body of a Person by Conduct Resulting in Penetration, However Slight, of Any Part of the Body of the Victim or of the Perpetrator with a Sexual Organ, or of the Anal or Genital Opening of the Victim with Any Object or Any Other Part of the Body*

Practitioners first need to establish that there was an invasion of the body of a person through penetration. This is gender-neutral and accordingly includes same-sex penetration and both male and/or female perpetrators and victims.<sup>407</sup>

Any form of penetration, however slight, is sufficient to complete this crime.<sup>408</sup> As such, in the case of vaginal rape, penetration of the labia majora would be sufficient. There are two forms of penetration covered by this element:

- Penetration of any part of the body with a *sexual organ*.<sup>409</sup> This is a broad definition which not only covers the penetration of the vagina or anus, but also covers oral penetration (i.e., penetration of the mouth).<sup>410</sup> In addition, the penetration may be of any part of the body of the *victim or the perpetrator*.<sup>411</sup> Consequently, a rape may occur where any part of the perpetrator's body has been penetrated by a sexual organ.
- Penetration of the *anal or genital opening of the victim with any object or any other part of the body*.<sup>412</sup> This covers penetration with something other than a sexual organ which could include penetration with other body parts, for example, a hand or an object.<sup>413</sup>

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<sup>407</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 ('Ntaganda Trial Judgment'), para. 933; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 ('Bemba Trial Judgment'), para. 100; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on the Confirmation of Charges, 9 June 2014, para. 52; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009 ('Sesay et al. Trial Judgment'), para. 146.

<sup>408</sup> See, ICC Elements of Crimes, Article 7(1)(g)-1; *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002 ('Kunarac et al. Appeal Judgment'), para. 127; *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998 ('Furundžija Trial Judgment'), para. 185; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 ('Kajelijeli Trial Judgment'), paras 912-915; *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Judgment, 15 May 2003 ('Semanza Trial Judgment'), paras 344-346.

<sup>409</sup> See, ICC Elements of Crimes, Article 7(1)(g)-1; *Bemba Trial Judgment*, para. 101; *Furundžija Trial Judgment*, paras 183-185; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 ('Delalić et al. Trial Judgment'), para. 1066; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Trial Judgment, 17 June 2004 ('Gacumbitsi Trial Judgment'), para. 321.

<sup>410</sup> *Bemba Trial Judgment*, para. 101; *Sesay et al. Trial Judgment*, para. 146; *Furundžija Trial Judgment*, paras 183-185; *Delalić et al. Trial Judgment*, para. 1066.

<sup>411</sup> ICC Elements of Crimes, Article 7(1)(g)-1; *Kunarac et al. Appeal Judgment*, para. 127; *Kajelijeli Trial Judgment*, para. 913; *Gacumbitsi Trial Judgment*, para. 321.

<sup>412</sup> ICC Elements of Crimes, Article 7(1)(g)-1; *Kunarac et al. Appeal Judgment*, para. 127; *Kajelijeli Trial Judgment*, para. 913; *Gacumbitsi Trial Judgment*, para. 321.

<sup>413</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 ('Akayesu Trial Judgment'), para. 596; *Sesay et al. Trial Judgment*, para. 146.

### 3.2.7.2 *Element Two: The Invasion was Committed by Force, or by Threat of Force or Coercion, such as that Caused by Fear of Violence, Duress, Detention, Psychological Oppression or Abuse of Power, Against Such Person or Another Person, or by Taking Advantage of a Coercive Environment, or the Invasion was Committed Against a Person Incapable of Giving Genuine Consent*

Practitioners also need to establish the circumstances and conditions which give the invasion a criminal character.<sup>414</sup> For an invasion of the body to constitute rape, it has to be committed under one or more of the following circumstances:<sup>415</sup>

1. By force;
2. By threat of force or coercion, such as that caused by fear, violence, duress, detention psychological oppression or abuse of power;
3. By taking advantage of a coercive environment; or
4. By taking advantage of a person incapable of giving genuine consent if affected by natural, induced or age-related incapacity.<sup>416</sup>

It is likely that several intersecting behaviours or circumstances will be in play at the same time or across a period of time which will amount to an environment in which consent is not possible. Nevertheless, it is not necessary to prove the victim's lack of consent,<sup>417</sup> and there is no requirement that the victim resisted.<sup>418</sup> In fact, it is common for there to be no physical resistance because of a variety of psychological factors or because the victim fears further violence on the part of the perpetrator.<sup>419</sup> It is only necessary to establish one of the coercive circumstances or conditions set out above in order for the penetration (Element One) to amount to rape.<sup>420</sup> The coercive behaviour or environment may be directed towards the victim or a third person.<sup>421</sup>

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<sup>414</sup> *Bemba* Trial Judgment, para. 102; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 ('*Katanga* Trial Judgment'), para. 964; *Kunarac et al.* Appeal Judgment, para. 127; *Kajelijeli* Trial Judgment, para. 913.

<sup>415</sup> ICC Elements of Crimes, Article 7(1)(g)-1; *Ntaganda* Trial Judgment, para. 934; *Bemba* Trial Judgment, para. 102; Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence' (2019), p. 47; *Kunarac et al.* Appeal Judgment, para. 129; *Akayesu* Trial Judgment, para. 688.

ICC Elements of Crimes, Article 7(1)(g)-1; *Ntaganda* Trial Judgment, para. 934; *Bemba* Trial Judgment, para. 102; Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence' (2019), p. 47; *Kunarac et al.* Appeal Judgment, para. 129; *Akayesu* Trial Judgment, para. 688.

<sup>417</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('*Ongwen* Trial Judgment'), para. 2709 (citing *Ntaganda* Trial Judgment, para. 934); *Katanga* Trial Judgment, para. 965. See also, ICC Rules of Procedure and Evidence, Rules 70 and 71.

<sup>418</sup> *Ongwen* Trial Judgment, para. 2709 (citing *Prosecutor v. Kaing Guek Eav (alias Duch)*, 001/18-07-2007/ECCC/TC, Trial Judgment, para. 363); *Prosecutor v. Taylor*, SCSL-03-01-1281, Trial Judgment, 18 May 2012 ('*Taylor* Trial Judgment'), para. 416; *Kunarac et al.* Appeal Judgment, para. 128. See also, *Fernández Ortega et al. v. Mexico*, Series C No. 215, Trial Judgment, 30 August 2010, para. 115.

<sup>419</sup> *M.C. v. Bulgaria*, application no. 39272/98, Judgment, 4 December 2003 ('*M.C. v. Bulgaria*'), para. 164.

<sup>420</sup> *Ongwen* Trial Judgment, para. 2709; *Ntaganda* Trial Judgment, para. 934; *Katanga* Trial Judgment, para. 965.

<sup>421</sup> Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence' (2019), p. 47; ICC Elements of Crimes, Articles 7(1)(g)-1, 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1, Element Two. See also, *Ntaganda* Trial Judgment, para. 944; *Kunarac et al.* Appeal Judgment, para. 130; *Prosecutor v. Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001 ('*Kunarac et al.* Trial Judgment'), para. 711.



Coercive circumstances need not be evidenced by a show of physical force<sup>422</sup> instead, threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion.<sup>423</sup> Where physical force does occur, it does not need to reach a significant level, such as “excessive” or “life-threatening physical force”.<sup>424</sup> A threat need not be a threat of physical force, but may be a threat of other harm. The threat itself is sufficient as long as it creates a reasonable fear in the victim that they or a third person will be harmed.<sup>425</sup>

In addition, perpetrators will often employ more subtle behaviours of coercion, such as inducements or bullying (e.g., verbal or psychological abuse or controlling behaviour) to create or exploit vulnerabilities in victims and make them dependent on, or subordinate to, their abuser.<sup>426</sup> Coercion may also be inherent in certain circumstances, such as armed conflict or occupation or the military presence of hostile forces amongst the civilian population.<sup>427</sup>

Accordingly, practitioners should consider the context in which the penetration (Element One) took place to assess coercion or whether it took place in a coercive environment. Several factors may contribute to creating a coercive environment, such as the number of people involved in the commission of the crime, and whether the rape was committed during or immediately following a combat situation or together with other crimes.<sup>428</sup> For example, in the *Ntaganda* case before the ICC, soldiers engaged in sexual violence in the immediate aftermath of the armed group’s takeover of villages and the rapes coincided with the commission of other crimes by the soldiers against the inhabitants of the villages.<sup>429</sup>

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<sup>422</sup> ICC Elements of Crimes, Article 7(1)(g)-1; *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, para. 934; *Bemba* Trial Judgment, para. 103; *Akayesu* Trial Judgment, para. 688; *Delalić et al.* Trial Judgment, para. 937; *Kunarac et al.* Appeal Judgment, para. 129; *Taylor* Trial Judgment, para. 416; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Judgment, 29 May 2013 (*Prlić et al.* Trial Judgment), para. 70; *Furundžija* Trial Judgment, para. 82; *Prosecutor v. Muhimana*, ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 297. See also, Council of Europe (‘CoE’) Convention on preventing and combating violence against women and domestic violence (adopted 11 May 2011, entered into force 01 August 2014) CETS No.210 (*‘Istanbul Convention’*), Article 36; CoE Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (11 May 2011) CETS No. 210 (*‘Istanbul Convention Explanatory Report’*), Article 36, para. 192; *M.C. v. Bulgaria*, paras 161, 163; Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19’ (14 July 2017) CEDAW/C/GC/35, para. 33.

<sup>423</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, para. 934-935; *Katanga* Trial Judgment, para. 965; *Bemba* Trial Judgment, paras 105-106.

<sup>424</sup> Amnesty International, ‘Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court’ (2011), p. 18.

<sup>425</sup> *Furundžija* Trial Judgment, para. 174; *Kunarac et al.* Appeal Judgment, para. 130; *Kunarac et al.* Trial Judgment, para. 711; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Trial Judgment, 27 February 2009 (*‘Rukundo Trial Judgment’*), paras 383-384, 388.

<sup>426</sup> *M.C. v. Bulgaria*, Application no. 39272/98, Judgment, 4 December 2003, para. 146; *Ongwen* Trial Judgment, para. 2710.

<sup>427</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, para. 935; *Kunarac et al.* Appeal Judgment, para. 130.

<sup>428</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, paras 935, 945; *Bemba* Trial Judgment, para. 104; *Kunarac et al.* Appeal Judgment, para. 130; *Semanza* Trial Judgment, para. 344; *Rukundo* Trial Judgment, paras 383-385.

<sup>429</sup> *Ntaganda* Trial Judgment, para. 945.

### 3.2.7.3 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body?</b>	<ul style="list-style-type: none"> <li>Was there penetration of any part of the body of the victim or perpetrator with a sexual organ?</li> <li>Was there penetration of the anal or genital opening of the victim with any object or any other part of the body?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that a soldier raped her and other women who were held in a basement during the occupation of their town.</li> <li>A victim stating that a Russian soldier held her at gunpoint and made her perform oral sex on him as well as then raping her.</li> <li>Medical examination reports indicating that the anal opening of the victim was penetrated by the perpetrators hand.</li> <li>Forensic evidence such as swabs, samples and DNA test results indicating that the victim's vagina was penetrated with a sexual organ.</li> <li>Video footage captured on a mobile phone of the perpetrators inserting their penises into the mouth of the male victim.</li> <li>A UN report indicating that a number of women and girls were alleged to be victims of rape at the hands of soldiers who inserted sticks into their vaginas.</li> </ul>
<b>Did the perpetrator do so:</b>	<ul style="list-style-type: none"> <li>by using force;</li> <li>by using the threat of force or coercion (e.g., fear, violence, duress, detention psychological oppression or abuse of power, against such person or another person);</li> <li>by taking advantage of a coercive environment; or</li> <li>by taking advantage of a person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?</li> </ul>	<ul style="list-style-type: none"> <li>A woman from Hostomel testifying that she was taken by a Russian soldier to an apartment building where she was forced to undress and raped.</li> <li>Witness testimony from witnesses and neighbours who saw a Russian soldier wave his pistol, threaten to shoot people, and drag a woman to a room on the second floor a building, where the witness later learned she was raped.</li> <li>Testimony of two victims, aged 12 and 15 years-old, that they were raped by Russian soldiers.</li> <li>Records of a detention centre demonstrating that the victims were detained when they were raped.</li> <li>Physical evidence of the force used during a rape such as bruises on the body of the victim or vaginal bleeding.</li> </ul>

		<ul style="list-style-type: none"> <li>• A UN report indicating that two Russian soldiers entered a home, raped a 22-year-old woman several times, committed acts of sexual violence on her husband and forced the couple to have sexual intercourse in their presence. Then one of the soldiers forced their 4-year-old daughter to perform oral sex on him.</li> <li>• Reports by an international organisation describing the coercive environment that existed prior to the commission of rapes, including attacks and the commission of other crimes.</li> </ul>
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Table 15: Article 7(1)(g)-1 Cues for Practitioners

### 3.2.8 Crime against Humanity of Sexual Slavery (Article 7(1)(g)-2, Rome Statute)

Article 7(1)(g) of the Rome Statute prohibits the crime against humanity of sexual slavery when committed in the context of a widespread and systematic attack on civilians.<sup>430</sup>

Sexual slavery as a crime against humanity is not currently prohibited under Ukrainian law. However, similar conduct may be criminalised under the ordinary crime of trafficking in human beings under Article 149 of the Criminal Code of Ukraine ('CCU'), which prohibits "[t]rafficking in human beings [...] for the purpose of exploitation [...]". According to Note 1 to this provision, exploitation of human beings includes, *inter alia*, all forms of sexual exploitation. Unlike the crime against humanity of sexual slavery, however, the CCU provision does not require the act of human trafficking to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

In addition, while Draft Bill 7290 (if, and when, it enters into force) does not include sexual slavery as one of the acts specifically criminalised as a crime against humanity under the CCU, this conduct can nevertheless be prosecuted as the crime against humanity of "conversion to slavery or human trafficking" under Article 442-1(1)(5), since sexual slavery is a form of enslavement (*see* Section 3.2.3 - Enslavement, above).

The elements of this crime are:<sup>431</sup>

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>432</sup>

<sup>430</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(g). The crime against humanity of sexual slavery is also prohibited under the SCSL Statute and as a war crime under Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute. *See*, UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(g)

<sup>431</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7(1)(g)-2.

<sup>432</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

2. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### **3.2.8.1 Element One: The Perpetrator Exercised any or all of the Powers Attaching to the Right of Ownership Over One or More Persons, such as by Purchasing, Selling, Lending or Bartering Such a Person or Persons, or by Imposing on them a Similar Deprivation of Liberty**

To establish this element, practitioners should seek information to establish that the perpetrator purchased, sold, lent, or bartered the victim, or imposed a similar deprivation of liberty on them.<sup>433</sup>

Exercising powers attaching to the right of ownership means the use, enjoyment and disposal of a person who is regarded as property, by placing them in a situation of dependence and depriving them of any form of autonomy.<sup>434</sup> This definition is broad and includes ‘chattel’ or ‘transactional’ slavery.<sup>435</sup> However, the enslavement does not need to involve a commercial transaction,<sup>436</sup> and includes imposing on the victim similar deprivations of liberty, such as by exacting forced labour or otherwise reducing them to a servile status,<sup>437</sup> or “trafficking in persons, in particular women and children”.<sup>438</sup> The imposition of ‘a similar deprivation of liberty’ may take many forms and “may cover situations where the victims have not been physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives”.<sup>439</sup>

There is no exhaustive list of situations or circumstances that reflect the exercise of the power of ownership.<sup>440</sup> However, a case-by-case assessment should be made, taking into account the following factors, among others:<sup>441</sup>

- detention or captivity and their respective duration;

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<sup>433</sup> ICC Elements of Crimes, Article 7(1)(c), Element 1.

<sup>434</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 (*Katanga Trial Judgment*), para. 975.

<sup>435</sup> R. Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 3<sup>rd</sup> Edition, CUP, 2015 (*Cryer et al. (2015)*), p. 473; *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002 (*Kunarac et al. Appeal Judgment*), para. 117.

<sup>436</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (*Ongwen Trial Judgment*), para. 2713; *Katanga Trial Judgment*, para. 976; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (*Ntaganda Trial Judgment*), para. 952; *Prosecutor v. Taylor*, SCSL-03-01-1281, Trial Judgment, 18 May 2012 (*Taylor Trial Judgment*), para. 420; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007 (*Brima et al. Trial Judgment*), para. 709.

<sup>437</sup> ‘Servile status’ is defined as a person in the condition or status resulting from any of the institutions or practices of slavery. See, 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Article 7(b).

<sup>438</sup> ICC Elements of Crimes, Article 7(1)(c), fn. 11.

<sup>439</sup> *Ongwen Trial Judgment*, para. 2713; *Ntaganda Trial Judgment*, para. 952; *Taylor Trial Judgment*, para. 420; *Brima et al. Trial Judgment*, para. 709. See also, *Katanga Trial Judgment*, para. 977.

<sup>440</sup> *Katanga Trial Judgment*, para. 975; *Ntaganda Trial Judgment*, para. 952; *Kunarac et al. Appeal Judgment*, para. 119; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009 (*Sesay et al. Trial Judgment*), para. 160.

<sup>441</sup> *Ongwen Trial Judgment*, para. 2712; *Katanga Trial Judgment*, para. 976; *Prosecutor v. Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001, paras 542-543; *Kunarac et al. Appeal Judgment*, paras 119, 121; *Sesay et al. Trial Judgment*, para. 160; *Taylor Trial Judgment*, para. 420; *Ntaganda Trial Judgment*, para. 952.

- restrictions on any freedom of choice or movement;
- measures taken to prevent or deter escape;
- the use of threats, force, or other forms of physical or mental coercion;
- forced labour or subjecting the person to servile status;
- the exertion of psychological pressure or control;
- the victim's vulnerability;
- the socioeconomic conditions in which the power is exerted;
- the nature of the physical environment;
- the assertion of exclusivity;
- the subjection to cruel treatment and abuse; or
- control of sexuality.

The subjective nature of the deprivation of liberty – i.e., the victim's “perception of his or her situation as well as his or her reasonable fear”<sup>442</sup> – is also relevant to a determination of whether the crime against humanity of enslavement has been established. However, despite being a potentially helpful evidentiary factor in determining whether an accused's actions amount to enslavement, the (non)consent of the victim is not an element of enslavement, which is, instead, exclusively concerned with the exercise of the rights of ownership over another person.<sup>443</sup>

There is no minimum period during which time the victim must be enslaved in order for an exercise of the power of ownership to amount to the crime against humanity of enslavement.<sup>444</sup> In addition, it is not a requirement of enslavement to prove that the perpetrator “intended to detain the victims under constant control for a prolonged period of time”.<sup>445</sup>

### **3.2.8.2 Element Two: The Perpetrator Caused One or More Persons to Engage in One or More Acts of a Sexual Nature**

In addition to demonstrating that the perpetrator exercised the right of ownership, practitioners must also establish that the perpetrator caused the enslaved person to engage in an act or acts of a sexual nature.<sup>446</sup> Sexual violence is an “additional element that, when combined with evidence of slavery, constitutes sexual slavery”.<sup>447</sup>

This element concerns “the victim's ability to decide the conditions in which he or she engages in sexual activity”.<sup>448</sup> Accordingly, sexual slavery involves the exercise of ownership powers by the perpetrator over a person's sexual autonomy.<sup>449</sup> Sexual slavery may also encompass situations where

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<sup>442</sup> *Katanga* Trial Judgment, para. 977; *Taylor* Trial Judgment, para. 420.

<sup>443</sup> *Kunarac et al.* Appeal Judgment, paras 120-123.

<sup>444</sup> *Ongwen* Trial Judgment, para. 2714; *Kunarac et al.* Appeal Judgment, para. 121.

<sup>445</sup> *Kunarac et al.* Appeal Judgment, para. 122.

<sup>446</sup> *Ongwen* Trial Judgment, para. 2715.

<sup>447</sup> *Taylor* Trial Judgment, para. 421, referring to *Sesay et al.* Trial Judgment, para. 162.

<sup>448</sup> *Katanga* Trial Judgment, para. 978; ICC *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 432, fn. 582.

<sup>449</sup> *Ntaganda* Trial Judgment, para. 1204; ICC, *Katanga* Trial Judgment, paras 975, 981, 1013; *Prosecutor v. Ongwen*, ICC-02/04-01/15 A A2, Amici Curiae Observations on Sexual- and Gender-Based Crimes, 23 December 2021, para. 15.

women and girls are forced to share the existence of (i.e., coexist with) a person with whom they are forced to engage in acts of a sexual nature.<sup>450</sup>

Sexual slavery may include forceful sexual intercourse (i.e., rape – *see* Section 3.2.7),<sup>451</sup> as well as other physical and non-physical acts of a sexual nature (i.e., enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence – *see* Sections 3.2.9 to 3.2.11).<sup>452</sup> The ‘sexual’ nature of an act may refer to acts that are carried out through sexual means or to acts that target a person’s sexuality.<sup>453</sup>

As the commission of the crime of sexual slavery may involve more than one perpetrator, the sexual acts need not have been perpetrated by the individual who exercised the rights attaching to ownership.<sup>454</sup>

### 3.2.8.3 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator exercise any or all of the powers of ownership, such as by purchasing, selling, lending or bartering the victim(s)?</li> <li>• Did the perpetrator deprive the victim of their liberty, including freedom of movement and choice?</li> <li>• Did the perpetrator exact forced labour from the victim(s)?</li> <li>• Did the perpetrator reduce the victim to a servile status (i.e., through debt bondage, serfdom, forced marriage, child exploitation, etc.)?</li> <li>• Did the perpetrator traffic the victim(s)?</li> <li>• What measures did the perpetrator put in place to deter the victim from escaping?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that she was deprived of her liberty and reduced to a servile status, performing different domestic duties such as cooking, fetching water, washing and collecting wood.</li> <li>• A prisoner ledger of a detention centre with descriptions of the work performed by each detainee.</li> <li>• A witness testifying that she overheard the perpetrator discussing the sale of another detainee to a fellow soldier.</li> <li>• Documents indicating purchase or sale of the victim by the perpetrator.</li> <li>• Chains and other bondage equipment used by the perpetrator</li> </ul>

<sup>450</sup> *Katanga* Trial Judgment, para. 976.

<sup>451</sup> *Ongwen* Trial Judgment, para. 3047; *Ntaganda* Trial Judgment, para. 955.

<sup>452</sup> *Ongwen* Trial Judgment, para. 2716. *See also*, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 688; *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 186; *Brima et al.* Trial Judgment, para. 720; *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Trial Judgment, 26 February 2009, paras 194-5, 199; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Trial Judgment, 27 February 2009, para. 380; ICC OTP, ‘2014 Policy Paper on Sexual and Gender-Based Crimes’ (June 2014), p. 3; ECOSOC, ‘Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict’ (22 June 1998) E/CN.4/Sub.2/1998/13 (‘ECOSOC, ‘Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict’), paras 21-22.

<sup>453</sup> *Ongwen* Trial Judgment, para. 2716; ECOSOC, ‘Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict’, para. 21.

<sup>454</sup> *Ntaganda* Trial Judgment, para. 980. *See also*, ICC Elements of Crimes, fns. 17, 52, 65.



	<ul style="list-style-type: none"> <li>• Was the victim particularly vulnerable?</li> <li>• Under what socioeconomic conditions did the perpetrator exercise the power of ownership over the victim?</li> </ul>	<ul style="list-style-type: none"> <li>• to restrict the freedom of movement of the victim(s).</li> <li>• Video footage of a market where victims were sold or purchased by the perpetrator in exchange for money or other goods.</li> <li>• A report indicating that the mission uncovered evidence that Russian soldiers had forced some women into sexual slavery.</li> </ul>
<p><b>Does the evidence show that the perpetrator caused one or more persons to engage in one or more acts of a sexual nature?</b></p>	<ul style="list-style-type: none"> <li>• What was the nature of the acts committed against the victim? Where, when and by whom were such acts committed?</li> <li>• Was the act in question sexual in nature?</li> <li>• Was a part of the body associated with sexuality targeted?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims testifying that after the attack on the village they were kept as the wives of soldiers, during which time they were forced to engage in acts of a sexual nature, such as penetration, with the perpetrator.</li> <li>• A diary of a soldier in which he described participating in sexual acts with the victim who he held in captivity.</li> <li>• A victim testifying that Russian soldiers occupied her home, refused to let her leave, forced her to perform domestic tasks and raped her repeatedly.</li> <li>• A medical evaluation of a victim who was held by force at a detention centre for over a month, indicating she was raped.</li> <li>• A UN report indicating that the Russian armed forces committed sexual violence against Ukrainian men and women under their custody, often resorting to forced nudity in a coercive and humiliating environment.</li> <li>• NGO reports of women enslaved and forced to perform acts of a sexual nature, including vaginal and oral penetration.</li> </ul>

Table 16: Article 7(1)(g)-2 Cues for Practitioners

### 3.2.9 Crime against Humanity of Enforced Prostitution (Article 7(1)(g)-3, Rome Statute)

Article 7(1)(g) of the Rome Statute prohibits the crime against humanity of enforced prostitution when committed in the context of a widespread and systematic attack on civilians.<sup>455</sup>

Enforced prostitution as a crime against humanity is not currently prohibited under Ukrainian law. However, such conduct may be criminalised under the ordinary crime of pimping or engaging a person in prostitution under Article 303 of the Criminal Code of Ukraine ('CCU'), which prohibits "[e]ngaging person in prostitution or compulsion to engage in prostitution, involving deceit, blackmail or vulnerable state of a person, with imposition of violence or threat of violence, or pimping". However, unlike the crime against humanity of enforced prostitution, the CCU provision does not require the act of engaging in prostitution to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of enforced prostitution (i.e., sexual exploitation) under common Article 442-1.1(4) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the crime against humanity of enforced prostitution contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>456</sup>

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>457</sup>

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<sup>455</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(g). The crime against humanity of enforced prostitution is also prohibited in the SCSL Statute. *See*, UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(g). Enforced prostitution is also prohibited as a war crime under Rome Statute, Articles 8(2)(b)(xxii) and 8(2)(c)(vi).

<sup>456</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7(1)(g)-3.

<sup>457</sup> ICC Elements of Crimes, Article 7(1)(g)-3.

**3.2.9.1 Element One: The Perpetrator Committed an Act of a Sexual Nature Against One or More Persons or Caused Such Person or Persons to Engage in an Act of a Sexual Nature by Force, or by Threat of Force or Coercion, Such as That Caused by Fear of Violence, Duress, Detention, Psychological Oppression or Abuse of Power, Against Such Person or Persons or Another Person, or By Taking Advantage of a Coercive Environment or Such Person's or Persons' Incapacity to Give Genuine Consent**

To satisfy this element, the following must be established:

1. the perpetrator either: (a) committed an act of a sexual nature against one or more persons; or (b) caused the person(s) to engage in an act of a sexual nature; and
2. the perpetrator used force, the threat of force or coercion, or took advantage of a coercive environment, or committed the sexual act against a person(s) incapable of giving genuine consent.

**3.2.9.1.1 *The Perpetrator Committed an Act of a Sexual Nature Against One or More Persons or Caused Such Person or Persons to Engage in an Act of a Sexual Nature***

First, practitioners must seek information either that the perpetrator committed an act of a sexual nature against one or more persons, or that the perpetrator caused a person(s) to engage in an act of a sexual nature.<sup>458</sup> This may include rape, as well as other physical and non-physical acts of a sexual nature.<sup>459</sup>

Conduct that is sexual in nature covers both physical and non-physical (i.e., psychological) acts with a sexual element.<sup>460</sup> Thus, acts such as forced nudity may amount to acts of a sexual nature, even in the absence of physical contact.<sup>461</sup>

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<sup>458</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, *Commentary*'), p. 215.

<sup>459</sup> ICC Elements of Crimes, Article 7(1)(g)-3; Triffterer & Ambos, *Commentary*, p. 215.

<sup>460</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 ('*Akayesu Trial Judgment*'), para. 688; *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998 ('*Furundžija Trial Judgment*'), para. 186; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007, para. 720; *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Trial Judgment, 26 February 2009, paras 194-195, 199; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Trial Judgment, 27 February 2009, para. 380. See also, ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014 ('ICC Policy Paper on Sexual and Gender-Based Crimes'), p. 3; UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, paras 21-22.

<sup>461</sup> *Akayesu Trial Judgment*, para. 688; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001 ('*Kunarac et al. Trial Judgment*'), paras 769, 772; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001, para. 170; *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 1013; *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Appeal Judgment, 22 February 2008 ('*Brima et al. Appeal Judgment*'), para. 184. See also, UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para. 21: Sexual violence includes acts such as 'forcing a person to strip naked in public'; ICC Office of the Prosecutor, Report on Preliminary Examination Activities 2016 (14 November 2016), para. 94: 'In addition, detainees were forcibly maintained in a state of forced nudity, compelled to perform physical exercises naked [...]'; ICC Policy Paper on Sexual and Gender-Based Crimes, p. 3: 'An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity'. Before, the ICC, the Bemba Arrest Warrant decision did not dispute the fact that forced nudity constitutes sexual violence; rather, the decision indicated that the alleged acts of forced nudity were not of sufficient gravity to prosecute: *Prosecutor v. Bemba*, ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, paras 39-40; Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence' (2019) ('The Hague Principles on Sexual Violence'), pp. 13-14.

Acts of a sexual nature can be committed by and against any person regardless of their age, sex or gender. This includes same-sex acts.<sup>462</sup> The perpetrator may commit the act of a sexual nature against one or more persons or cause the person to engage in an act of a sexual nature against themselves or a third party.<sup>463</sup>

The Hague Principles on Sexual Violence provide useful guidance on what, in context, makes violence ‘sexual’, especially from the viewpoint of survivors.<sup>464</sup> Understanding what may amount to an act of a sexual nature will be important for practitioners to fully appreciate the broad range of conduct that may be charged as sexual violence in Ukraine (see Section 7.1.1 for more information on how to identify acts of a sexual nature).

#### 3.2.9.1.2 The Perpetrator Used Force, the Threat of Force or Coercion, or Took Advantage of a Coercive Environment, or Committed the Sexual Act Against a Person(s) Incapable of Giving Genuine Consent

In addition, practitioners should seek information showing that the perpetrator committed the aforementioned act(s) of a sexual nature by force, by threat of force or coercion, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.

It is not necessary to prove the victim’s lack of consent,<sup>465</sup> and there is no requirement that the victim resisted.<sup>466</sup> In fact, it is common for there to be no physical resistance because of a variety of psychological factors or because they fear further violence on the part of the perpetrator.<sup>467</sup> It is only necessary to establish one of the coercive circumstances or conditions set out above.<sup>468</sup> The coercive behaviour or environment may be directed towards the victim or a third person.<sup>469</sup>

Use of physical force is not necessary.<sup>470</sup> Indeed, coercive circumstances need not be evidenced by a show of physical force instead, threats, intimidation, extortion and other forms of duress which prey

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<sup>462</sup> *Prosecutor v. - Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 (‘*Bemba Trial Judgment*’), para. 100; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (‘*Ntaganda Trial Judgment*’), para. 933. See also, ICC Policy Paper on Sexual and Gender-Based Crimes, fn. 6.

<sup>463</sup> The Hague Principles on Sexual Violence, p. 8; ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One. See e.g., *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 (‘*Delalić et al. Trial Judgment*’), para. 1065; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment, 31 July 2001, paras 38-40.

<sup>464</sup> The Hague Principles on Sexual Violence.

<sup>465</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (‘*Ongwen Trial Judgment*’), para. 2709 (citing *Ntaganda Trial Judgment*, para. 934); *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 (‘*Katanga Trial Judgment*’), para. 965. See also, ICC Rules of Procedure and Evidence, Rules 70 and 71.

<sup>466</sup> *Ongwen Trial Judgment*, para. 2709 (citing Dutch Trial Judgement, para. 363); *Prosecutor v. Charles Taylor*, SCSL-03-01-1281, Trial Judgment, 18 May 2012 (‘*Taylor Trial Judgment*’), para. 416; *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002 (‘*Kunarac et al. Appeal Judgment*’), para. 128. See also, *Fernández Ortega et al. v. Mexico*, Series C No. 215, Trial Judgment, 30 August 2010, para. 115.

<sup>467</sup> *M.C. v. Bulgaria*, application no. 39272/98, Judgment, 4 December 2003 (‘*M.C. v. Bulgaria*’), para. 164.

<sup>468</sup> *Ongwen Trial Judgment*, para. 2709; *Ntaganda Trial Judgment*, para. 934; *Katanga Trial Judgment*, para. 965.

<sup>469</sup> The Hague Principles on Sexual Violence, p. 47; ICC Elements of Crimes, Articles 7(1)(g)-3; See also, *Ntaganda Trial Judgment*, para. 944; *Kunarac et al. Appeal Judgment*, para. 130; *Kunarac et al. Trial Judgment*, para. 711.

<sup>470</sup> ICC Elements of Crimes, Article 7(1)(g)-3; *Ongwen Trial Judgment*, para. 2710; *Ntaganda Trial Judgment*, para. 934; *Bemba Trial Judgment*, para. 103; *Akayesu Trial Judgment*, para. 688; *Delalić et al. Trial Judgment*, para. 937; *Kunarac et al. Appeal Judgment*, para. 129; *Taylor Trial Judgment*, para. 416; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Judgment, 29 May 2013, para. 70; *Furundžija Trial Judgment*, para. 82; *Prosecutor v. Muhimana*, ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 297. See also, Council of Europe (‘CoE’) Convention on preventing and combating violence against women and domestic violence

on fear or desperation may constitute coercion.<sup>471</sup> In addition, coercion may be inherent in certain circumstances, such as armed conflict, occupation or the military presence of hostile forces amongst the civilian population.<sup>472</sup>

Practitioners should consider the context in which the acts of a sexual nature took place to assess whether there was coercion or whether it took place in a coercive environment. Several factors may contribute to creating a coercive environment, such as the number of people involved in the commission of the crime, or whether the act of a sexual nature was committed during or immediately following a combat situation, or together with other crimes.<sup>473</sup>

### 3.2.9.2 *Element Two: The Perpetrator or Another Person Obtained or Expected to Obtain Pecuniary or Other Advantage in Exchange for or in Connection with the Acts of a Sexual Nature*

Second, it must be shown that the perpetrator or another person obtained or expected to obtain a monetary or another form of payment or advantage in exchange for or in connection with the acts of a sexual nature.<sup>474</sup> The crime of enforced prostitution might also cover situations in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm.<sup>475</sup>

### 3.2.9.3 *General Contextual and Mental Elements*

Finally, practitioners should also seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator committed an act of a sexual nature against one or more persons or cause such person or persons to engage in an act</b>	<ul style="list-style-type: none"> <li>Did the perpetrator cause the victim(s) to engage in any physical or non-physical act(s) of a sexual nature with the perpetrator?</li> <li>Did the perpetrator cause the victim(s) to engage in any physical or non-physical act(s) of a sexual nature with themselves or another person?</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that a soldier forced her to strip naked in front of other soldiers.</li> <li>A website where pictures of the victims were posted with advertisements for sexual services.</li> <li>Police reports describing the victim being forced to masturbate in front of soldiers.</li> <li>Video evidence recorded on a mobile phone showing women dancing naked and touching themselves.</li> </ul>

(adopted 11 May 2011, entered into force 01 August 2014) CETS No.210 ('Istanbul Convention'), Article 36; CoE Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (11 May 2011) CETS No. 210 ('Istanbul Convention Explanatory Report'), Article 36, para. 192; *M.C. v. Bulgaria*, paras 161, 163; Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19' (14 July 2017) CEDAW/C/GC/35, para. 33.

<sup>471</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, paras 934-935; *Katanga* Trial Judgment, para. 965; *Bemba* Trial Judgment, paras 105-106.

<sup>472</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, para. 935.

<sup>473</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, paras 935, 945; *Bemba* Trial Judgment, para. 104.

<sup>474</sup> Triffterer & Ambos, *Commentary*, pp. 215, 497.

<sup>475</sup> Triffterer & Ambos, *Commentary*, p. 215.

<b>of a sexual nature?</b>		<ul style="list-style-type: none"> <li>• A UN report describing testimonies of persons who had been forced to perform oral sex on numerous soldiers who visited the house they were detained in.</li> </ul>
<b>Did the perpetrator do so:</b>	<ul style="list-style-type: none"> <li>• by force;</li> <li>• by threat of force or coercion (e.g., fear, of violence, duress, detention psychological oppression or abuse of power);</li> <li>• by taking advantage of a coercive environment; or</li> <li>• by taking advantage of a person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that she was forced to undress by a Russian soldier who threatened to beat her if she did not comply.</li> <li>• A video of Russian soldiers with guns forcing women into a room where the sexual violence took place.</li> <li>• A victim testifying that she performed the sexual acts because otherwise the perpetrator detaining her would not give her food.</li> <li>• A report by a human rights organisation indicating that the victims were detained by soldiers who forced them to perform sexual acts whilst detained in a prison.</li> <li>• A medical examination report detailing that the victim had multiple bruises across her body and rope marks across her wrist indicating she had been restrained.</li> </ul>
<b>Does the evidence show that a monetary or other form of payment or advantage was obtained or expected in exchange for or in connection with the act(s) of a sexual nature?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator or another person benefit (or expect to benefit) financially in exchange for or in connection with the acts of a sexual nature?</li> <li>• Did the perpetrator or another person benefit (or expect to benefit) monetarily, materially or by obtaining another advantage in exchange for or in connection with the acts of a sexual nature?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims testifying that they were required to collect money from each man brought to them and that they had to earn a certain amount of money per evening though their sexual acts.</li> <li>• Bank transfers between the perpetrator and the 'client' who had sex with the victim.</li> <li>• Photographs of a car that was allegedly gifted to the perpetrator in exchange for the perpetrator's act of bringing girls to a third person for sexual acts.</li> <li>• Reports of international organisations or NGOs describing a system whereby the perpetrators received money or favours from the individuals (i.e., the 'clients') in exchange for acts of a sexual nature by the victim.</li> </ul>

Table 17: Article 7(1)(g)-2 Cues for Practitioners



### 3.2.10 Crime against Humanity of Forced Pregnancy (Article 7(1)(g)-4, Rome Statute)

Article 7(1)(g) of the Rome Statute prohibits the crime against humanity of forced pregnancy when committed in the context of a widespread and systematic attack on civilians.<sup>476</sup> Forced pregnancy is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy”.<sup>477</sup> Note that the definition’s stipulation that “[t]his definition shall not in any way be interpreted as affecting national laws related to pregnancy” does not add a new element to the crime, but, instead, allays concerns that the crime of forced pregnancy may be seen as legalising abortion.<sup>478</sup>

Forced pregnancy as a crime against humanity is not currently prohibited under Ukrainian law. However, such conduct may be criminalised under the ordinary crime of trafficking in human beings under Article 149 of the Criminal Code of Ukraine (‘CCU’), which prohibits “[t]rafficking in human beings [...] for the purpose of exploitation [...]”. According to Note 1 to this provision, exploitation of human beings includes, *inter alia*, forced pregnancy. However, unlike the crime against humanity of forced pregnancy, the CCU provision does not require the act of human trafficking to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

In addition, Draft Bill 7290 will (if, and when, it comes into force) introduce the specific crime against humanity of forced pregnancy under Article 442-1.1(4) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the crime against humanity of forced pregnancy contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>479</sup>

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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<sup>476</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 7(1)(g). The crime against humanity of forced pregnancy is also prohibited in the following international legal instruments: UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 2(g). Forced pregnancy is also prohibited as a war crime under Rome Statute, Articles 8(2)(b)(xxii) and 8(2)(c)(vi).

<sup>477</sup> Rome Statute, Article 7(2)(f).

<sup>478</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (‘Ongwen Trial Judgment’), para. 2721.

<sup>479</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 7(1)(g)-4.

### **3.2.10.1 Element One: The Perpetrator Confined One or More Women Forcibly Made Pregnant, with the Intent of Affecting the Ethnic Composition of any Population or Carrying out Other Grave Violations of International Law**

To establish this element, practitioners must first seek information demonstrating that the perpetrator unlawfully confined one or more women, i.e., that the victim was subjected to a deprivation of their physical liberty contrary to international law.<sup>480</sup> Deprivations of physical liberty may include, for example, imprisonment, house arrest, restriction to a closed city, or similar restrictions, including internment in concentration or detention camps.<sup>481</sup> There is no minimum duration required for the confinement.<sup>482</sup> For more information on deprivation of liberty, see Section 3.2.5 (Article 7(1)(e) Imprisonment), above. However, note that the ICC Elements of Crimes do not specify that the deprivation of liberty under this provision needs to be ‘severe’, unlike the requirement under Article 7(1)(e).<sup>483</sup>

Second, practitioners should seek information showing that the forcibly confined woman or women were made forcibly pregnant by the perpetrator or another person.<sup>484</sup> Note that the forcible conception could have occurred prior to or during the unlawful confinement.<sup>485</sup> Practitioners should seek to collect information indicating that the perpetrator coerced the victim(s) through fear of violence, duress, detention, psychological oppression or abuse of power, as well as information showing that the victim was incapable of giving genuine consent.<sup>486</sup>

Finally, practitioners should seek information showing that, in confining a forcibly impregnated woman,<sup>487</sup> the perpetrator had the specific intent of:<sup>488</sup>

1. affecting the ethnic composition of any population, *or*
2. carrying out other grave violations of international law, such as using the victim as a forced wife, committing rape, sexual enslavement, torture or another crime under the Rome Statute, regardless of whether the perpetrator specifically intended to keep the woman pregnant.<sup>489</sup>

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<sup>480</sup> *Ongwen Trial Judgment*, para. 2724; .

<sup>481</sup> *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001 (*Kordić and Čerkez Trial Judgment*), para. 299; *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000 (*Blaškić Trial Judgment*), paras 684, 691, 700; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Judgment, 25 February 2004 (*Ntagerura et al. Trial Judgment*), para. 702.

<sup>482</sup> *Ongwen Trial Judgment*, para. 2724.

<sup>483</sup> *Ongwen Trial Judgment*, para. 2724.

<sup>484</sup> *Ongwen Trial Judgment*, paras 2725.

<sup>485</sup> *Ongwen Trial Judgment*, para. 2723.

<sup>486</sup> *Ongwen Trial Judgment*, para. 2725.

<sup>487</sup> This special intent does not apply to the act of forcibly impregnating the victim itself. *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges Against Dominic Ongwen, 23 March 2016 (*Ongwen Decision on the Confirmation of the Charges*), para. 99.

<sup>488</sup> *Ongwen Trial Judgment*, paras 2726-2727.

<sup>489</sup> *Ongwen Trial Judgment*, para. 2729.

### 3.2.10.2 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator confined one or more women forcibly made pregnant?</b>	<ul style="list-style-type: none"> <li>Was the victim deprived of her physical liberty?</li> <li>Was the confinement unlawful?</li> <li>Was the victim made pregnant prior to or at any time during her confinement?</li> <li>Was her pregnancy forced, i.e., did it involve the use of force, including violence or other coercion or threat of force?</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that she was ‘distributed’ to the perpetrator’s home during her pregnancy, where she was placed under heavy guard and told that if she tried to escape, she would be killed.</li> <li>Evidence collected during the physical examination of the victim, who had been confined to the perpetrator’s home, indicating that she had been repeatedly raped and impregnated.</li> <li>Photographs of the pregnant victim pictured with the soldier who had raped and impregnated her.</li> <li>A UN report establishing that when the women interviewed were forcibly made pregnant, they were told by the perpetrators that they were to be confined until they were six months pregnant.</li> </ul>
<b>Does the evidence show that the perpetrator confined the forcibly impregnated woman with the intent of affecting the ethnic composition of any population <u>or</u> carrying out other grave violations of international law?</b>	<ul style="list-style-type: none"> <li>Was the ethnic identity of the perpetrator and the victim different? Was the perpetrator aware of this difference?</li> <li>Did the perpetrator ever acknowledge by words or actions their intent to affect the ethnic composition of the population in confining the victim(s)?</li> <li>Did the ethnic composition of the population change? Was the perpetrator aware of this change?</li> <li>Is there any evidence of ethnicity-based discrimination around the same time as the offence? Was the perpetrator aware of this ethnic discrimination?</li> <li>Was the confinement committed alongside other grave violations of international law?</li> <li>Did the perpetrator ever acknowledge by words or actions their intent to commit any grave</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that, while confined to the perpetrator’s home without the possibility of escape, she fell pregnant three times as a result of rapes by the perpetrator.</li> <li>Witness testimony by a member of the perpetrator’s guard indicating that the pregnant women they guarded were ‘wives’ of the perpetrator.</li> <li>Evidence collected during the physical examination of the victim, who had been confined to the perpetrator’s home, indicating that she had been repeatedly raped and impregnated.</li> <li>Documents demonstrating the change in ethnic composition of an area where forced pregnancy took place, such as census records.</li> <li>An NGO report indicating that when women interviewed were forcibly made pregnant, they were told by the perpetrators that their child will be the same ethnicity as the perpetrator.</li> </ul>

	violation of international law in confining the victim(s)? <ul style="list-style-type: none"> <li>Was the perpetrator a member of a group or organisation implementing a policy to commit grave violations of international law?</li> </ul>	
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Table 18: Article 7(1)(g)-4 Cues for Practitioners

### 3.2.11 Crime against Humanity of Sexual Violence (Article 7(1)(g)-6, Rome Statute)

Article 7(1)(g) of the Rome Statute prohibits the crime against humanity of sexual violence when committed in the context of a widespread and systematic attack on civilians.<sup>490</sup>

Sexual violence as a crime against humanity is not currently prohibited under Ukrainian law. However, this conduct is covered by the ordinary crime of sexual violence under Article 153 of the Criminal Code of Ukraine ('CCU'), which prohibits "[c]ommitting any sexual violence, not related to the penetration into another person's body, without the voluntary consent of the victim (sexual violence)". Unlike the crime against humanity of sexual violence, however, the CCU provision does not require the act of sexual violence to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of sexual violence under common Article 442-1.1(4) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the crime against humanity of sexual violence contained in the ICC Rome Statute and Elements of Crimes. However, as discussed below, the Draft Bill is wider in scope than the Rome Statute provision since it does not include a gravity threshold (Elements Two and Three of the ICC Elements of Crimes).

The elements of this crime are:<sup>491</sup>

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

<sup>490</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(g). The crime against humanity of sexual violence is also prohibited in the SCSL Statute. *See*, UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 2(g). Sexual violence is also prohibited as a war crime under Rome Statute, Articles 8(2)(b)(xxii) and 8(2)(c)(vi).

<sup>491</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7(1)(g)-6.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

**3.2.11.1 Element One: The Perpetrator Committed an Act of a Sexual Nature Against One or More Persons or Caused Such Person or Persons to Engage in an Act of a Sexual Nature by Force, or by Threat of Force or Coercion, Such as That Caused by Fear of Violence, Duress, Detention, Psychological Oppression or Abuse of Power, Against Such Person or Persons or Another Person, or By Taking Advantage of a Coercive Environment or Such Person's or Persons' Incapacity to Give Genuine Consent**

To satisfy this element, practitioners must establish:

1. That the perpetrator either: (a) committed an act of a sexual nature against one or more persons; or (b) caused the person(s) to engage in an act of a sexual nature; and
2. That the perpetrator used force, the threat of force or coercion, or took advantage of a coercive environment, or committed the sexual act against a person(s) incapable of giving genuine consent.

**3.2.11.1.1 The Perpetrator Committed an Act of a Sexual Nature Against One or More Persons or Caused Such Person or Persons to Engage in an Act of a Sexual Nature**

First, practitioners should seek information showing either that the perpetrator committed an act of a sexual nature against one or more persons, or that the perpetrator caused a person or persons to engage in an act of a sexual nature.<sup>492</sup>

Practitioners should consider the following.

- Both physical and non-physical acts are covered by “acts of a sexual nature”.<sup>493</sup> See Section 7.1.1 for more information on how to identify acts of a sexual nature.
- Such acts can be committed by and against any person regardless of age, sex or gender. This includes same-sex acts.<sup>494</sup>

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<sup>492</sup> *Prosecutor v. Dordević*, IT-05-87/1-T, Trial Judgment, 23 February, para. 1768; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 (*Delalić et al. Trial Judgment*), para. 1065; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment, 31 July 2001 (*Todorović Sentencing Judgment*), paras 37-40.

<sup>493</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (*Akayesu Trial Judgment*), para. 688; *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998 (*Furundžija Trial Judgment*), para. 186; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007, para. 720; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Judgment, 26 February 2009, paras 194-195, 199; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Trial Judgment, 27 February 2009, para. 380. See also, ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014 (*ICC Policy Paper on Sexual and Gender-Based Crimes*), p. 3; UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, paras 21-22.

<sup>494</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 (*Bemba Trial Judgment*), para. 100; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (*Ntaganda Trial Judgment*), para. 933. See also, ICC Policy Paper on Sexual and Gender-Based Crimes, fn. 6.

- The perpetrator may cause the victim to engage in the act of a sexual nature against themselves or a third person.<sup>495</sup>

Sexual violence can be committed through a multitude of different acts, including:<sup>496</sup>

1. Acts committed with a sexual motive or for the sexual gratification of the perpetrator;
2. Scenarios where two or more unwilling participants are forced to carry out sexual acts on each other;
3. Acts committed for the purpose of humiliation or degradation, such as forcible public nudity; or
4. Acts which target the victim's sexual organs or sexual function, such as forcible castration, genital mutilation or sexualised torture.

#### 3.2.11.1.2 The Perpetrator Used Force, the Threat of Force or Coercion, or Took Advantage of a Coercive Environment, or Committed the Sexual Act Against a Person(s) Incapable of Giving Genuine Consent

In addition, practitioners should seek information showing that the perpetrator committed the aforementioned act(s) of a sexual nature by force, by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.<sup>497</sup> For an in-depth discussion of this element, practitioners should refer to the equivalent element of the crime against humanity of enforced prostitution (*see* Section 3.2.9.1.2)

#### **3.2.11.2 Element Two: Such Conduct was of a Gravity Comparable to the Other Offences in Article 7, Paragraph 1 (g), of the Statute**

To satisfy this element, practitioners should seek information demonstrating that the perpetrator's conduct was of a gravity comparable to other acts of sexual violence established under Article 7(1)(g) (e.g., rape; sexual slavery; enforced prostitution; forced pregnancy; and enforced sterilization).<sup>498</sup> However, the gravity criterion should not be understood to exclude acts that do not involve penetration or physical contact.<sup>499</sup>

<sup>495</sup> The Hague Principles on Sexual Violence, p. 8; ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One. *See e.g., Delalić et al. Trial Judgment*, para. 1065; *Todorović Sentencing Judgment*, paras 38-40.

<sup>496</sup> *Akayesu Trial Judgment*, para. 688; *Kunarac et al. Trial Judgment*, paras 769, 772; *Kvočka et al. Trial Judgment*, para. 170; *Brđanin Trial Judgment*, para. 1013; *Brima et al. Appeal Judgment*, para. 184. *See also*, UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para. 21; ICC Office of the Prosecutor, Report on Preliminary Examination Activities 2016 (14 November 2016), para. 94; ICC Policy Paper on Sexual and Gender-Based Crimes, p. 3; O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, *Commentary*'), p. 217; The Hague Principles on Sexual Violence, pp. 13-14.

<sup>497</sup> ICC Elements of Crimes, Article 7(1)(g)-6, Element 1.

<sup>498</sup> Rome Statute, Article 7(1)(g).

<sup>499</sup> Triffterer & Ambos, *Commentary*, p. 216. To date, the only jurisprudence related to the 'comparable gravity' criterion relates to the related crime against humanity and emanates from the *Bemba Arrest Warrant Decision* where the Pre-Trial Chamber found that forcible undressing was not of comparable gravity to the other crimes in Article 7(1)(g): *Bemba Arrest Warrant Decision*, para. 40. However, jurisprudence from the *ad hoc* tribunals confirms that forced nudity is to be considered as an act of sexual violence: *Akayesu Trial Judgment*, para. 688; *Kunarac et al. Trial Judgment*, paras 769, 772; *Kvočka et al. Trial Judgment*, para. 170; *Brđanin Trial Judgment*, para. 1013; *Brima et al. Appeal Judgment*, para. 184. *See also*,



It should be noted that this requirement is unique to the Rome Statute, the statutes of other international courts/tribunals and legislation in some European jurisdictions do not require an act of sexual violence to be of “comparable gravity” to other crimes against humanity.<sup>500</sup> In addition, Article 442-1.1(4) of Draft Bill 7290 does not include the criterion that the sexual violence be ‘of comparable gravity’, thus leaving the door open for a broader application of the provision than its counterpart in the Rome Statute. As such, this element would not need to be established to prove the crime against humanity of sexual violence under Draft Bill 7290.

### 3.2.11.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established the Gravity of the Conduct

Practitioners should also seek information showing that the perpetrator was aware of the factual circumstances that established the gravity of the conduct. This element is focused on awareness of the factual circumstances that established the gravity of the conduct, and it is not necessary that the perpetrator made any legal evaluation that the act of sexual violence was of a gravity comparable to other acts of sexual violence established under Article 7(1)(g).<sup>501</sup>

### 3.2.11.4 General Contextual and Mental Elements

Finally, practitioners should identify information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to</b>	<ul style="list-style-type: none"> <li>Did the perpetrator cause the victim(s) to engage in any physical or non-physical act of a sexual nature with the perpetrator?</li> <li>Did the perpetrator cause the victim(s) to engage in any physical or non-physical act of a sexual nature with themselves or another person?</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that a Russian soldier touched her genitals, grabbed her breast and threatened to rape her.</li> <li>A victim describing being forced to undress during a search by soldiers who also touched her breasts and taunted her in a sexual manner.</li> <li>Forensic evidence showing that the victim had been beaten, mutilated, and electrocuted on his genitals during interrogation.</li> </ul>

UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para. 21; Report on Preliminary Examination Activities 2016, para. 94: ICC Policy Paper on Sexual and Gender-Based Crimes, p. 3.

<sup>500</sup> See, UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 5(g); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 3(g); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 2(g); Germany, *Law Introducing the International Crimes Code*, 2002, Section 7(1)(6); Croatia, *Criminal Code*, 1997 (as amended in 2006), Article 157a.

<sup>501</sup> See, M. Klamberg and J. Nilsson (eds), *Commentary on the Law of the International Criminal Court – The Rome Statute*, Article 7(1)(e).

<b>engage in an act of a sexual nature?</b>		<ul style="list-style-type: none"> <li>• A UN report indicating that the Russian armed forces detained a priest, undressed him fully, beat him, and ordered him to parade naked for one hour in the streets of his village.</li> <li>• Video evidence recorded on a mobile phone of soldiers forcing detainees to line up naked.</li> <li>• Witness testimony that, while detained by the Russian forces, they were stripped naked and forced to stand in front of other for hours.</li> <li>• A Report of a UN Special Rapporteur describing testimonies of persons who had been sexually touched by prison guards.</li> </ul>
<b>Did the perpetrator do so:</b>	<ul style="list-style-type: none"> <li>• by force;</li> <li>• by threat of force or coercion (e.g., fear, violence, duress, detention psychological oppression or abuse of power);</li> <li>• by taking advantage of a coercive environment; or</li> <li>• by taking advantage of a person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that she was forced to undress and walk in front of prison guards while in detention.</li> <li>• A video of soldiers with guns forcing women into a room where the sexual violence took place.</li> <li>• A report by Amnesty International describing the ongoing fighting and commission of other crimes in the village where the alleged acts of sexual violence took place.</li> <li>• A UN report describing an incident where two Russian soldiers entered a home, raped a 22-year-old woman several times, committed acts of sexual violence on her husband and forced the couple to have sexual intercourse in their presence.</li> </ul>

Table 19: Article 7(1)(g)-6 Cues for Practitioners

### 3.2.12 Crime against Humanity of Persecution (Article 7(1)(h), Rome Statute)

Article 7(1)(h) of the Rome Statute prohibits “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law”.<sup>502</sup> The Rome Statute defines

<sup>502</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 7(1)(h). The crime against humanity of persecution is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 5(h); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 3(h); UN

‘persecution’ as “the intentional and severe deprivation of fundamental rights of a group of persons due to their group identity or collectivity”.<sup>503</sup>

Persecution as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of persecution under Article 442-1.1(1) of the Criminal Code of Ukraine. ‘Persecution’ is defined in the Draft Bill as “the restriction of fundamental human rights on the basis of political, racial, national, ethnic, cultural, religious, sexual or other grounds of discrimination defined by international law”. As such, this provision will integrate both the contextual elements and the specific elements of the crime against humanity of persecution contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>504</sup>

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

#### ***3.2.12.1 Element One: The Perpetrator Severely Deprived, Contrary to International Law, One or More Persons of Fundamental Rights***

To satisfy this element, practitioners should seek information demonstrating that one or more persons were deprived of their fundamental rights, contrary to international law.<sup>505</sup> Fundamental

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Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 2(h); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 (‘ECCC Law’), Article 5.

<sup>503</sup> Rome Statute, Article 7(2)(g).

<sup>504</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 7(1)(h).

<sup>505</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (‘Ongwen Trial Judgment’), para. 2733; *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeal Judgment, 29 November 2017 (‘Prlić et al. Appeal Judgment’), para. 422; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005 (‘Blagojević & Jokić Trial Judgment’), para. 579; *Prosecutor v. Kordić and Čerkez*, ICTY-95-14/2A, Appeal Judgment, 17 December 2004 (‘Kordić and Čerkez Appeal Judgment’), para. 101; *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Judgment, 15 May 2003 (‘Semanza Trial Judgment’), paras 347-348.

rights are human rights established under customary international law and international human rights treaties.<sup>506</sup>

Broadly, these include violations that cause: (i) serious bodily and mental harm; (ii) infringements against freedom; and (iii) attacks against property.<sup>507</sup> This may include a variety of rights, such as the right to life, the right to personal liberty and security of the person, the right not to be subjected to torture or cruel, inhumane or degrading treatment, the right not to be subjected to arbitrary arrest, detention or exile, and the right to private property.<sup>508</sup> The deprivation of fundamental rights must be contrary to international law, meaning that no justification exists under international law for the violation.<sup>509</sup>

When carried out on discriminatory grounds, considered in conjunction with other acts, and the contextual elements of crimes against humanity are fulfilled, the following acts, among others, can amount to ‘persecution’:

- murder;<sup>510</sup>
- attacks on civilians;<sup>511</sup>
- torture (e.g., physical violence, psychological violence, sexual violence, etc.);<sup>512</sup>
- pillage;<sup>513</sup>
- the denial of freedom of movement;<sup>514</sup>

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<sup>506</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019, (*Ntaganda Trial Judgment*), para. 991; *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgment, 29 July 2004 (*Blaškić Appeal Judgment*), para. 139; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 (*Karadžić Trial Judgment*), para. 499; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP, 2016) (*Schabas, ICC: Commentary*), p. 196. See also, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Confirmation of Charges, 9 June 2014 (*Ntaganda Decision on the Confirmation of Charges*), para. 58. The relevant international instruments include: (i) the Universal Declaration of Human Rights; (ii) the International Covenant on Civil and Political Rights; (iii) the International Covenant on Economic, Social and Cultural Rights; (iv) the European Convention on Human Rights; (v) the American Convention on Human Rights; and (vi) the African Charter on Human and People's Rights.

<sup>507</sup> *Ongwen Trial Judgment*, para. 2733: “fundamental rights [...] may include a variety of rights, such as the right to life, the right to personal liberty, the right not to be held in slavery or servitude, the right not to be subjected to torture or cruel treatment, inhuman or degrading treatment, and the right to private property.” See also, *Ntaganda Trial Judgment*, para. 991; *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000 (*Blaškić Trial Judgment*), para. 220; O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (*Triffterer & Ambos, Commentary*), p. 276.

<sup>508</sup> *Ongwen Trial Judgment*, para. 2733; *Ntaganda Trial Judgment*, para. 991; *Blaškić Trial Judgment*, para. 220; *Kordić and Čerkez Appeal Judgment*, paras 104-109; *Blagojević & Jokić Trial Judgment*, paras 585-600.

<sup>509</sup> *Ntaganda Trial Judgment*, para. 993; *Kordić and Čerkez Appeal Judgment*, para. 103; *Blaškić Appeal Judgment*, para. 139.

<sup>510</sup> *Prosecutor v. Stakić*, IT-97-24-T, Trial Judgment, 31 July 2003 (*Stakić Trial Judgment*), para. 747; *Kordić & Čerkez Appeal Judgment*, paras 106-109; *Blaškić Appeal Judgment*, para. 143.

<sup>511</sup> *Kordić & Čerkez Appeal Judgment*, paras 104-105; *Blaškić Appeal Judgment*, paras 156-159.

<sup>512</sup> *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004 (*Brdanin Trial Judgment*), para. 1012; *Stakić Trial Judgment*, paras 748-760; *Karadžić Trial Judgment*, paras 505-513; *Blaškić Appeal Judgment*, paras 154-155.

<sup>513</sup> *Stakić Trial Judgment*, paras 762-764; *Brdanin Trial Judgment*, para. 1045; *Kordić & Čerkez Appeal Judgment*, paras 108-109; *Karadžić Trial Judgment*, paras 527-529; *Blaškić Appeal Judgment*, paras 144-148.

<sup>514</sup> *Stakić Trial Judgment*, paras 770-773; *Prosecutor v. Mladic*, IT-09-92-T, Trial Judgment, 22 November 2017 (*Mladic Trial Judgment*), paras 3263-3266; *Brdanin Trial Judgment*, paras 1042-1043, 1049; *Prosecutor v. Brdanin*, IT-99-36-A, Appeal Judgment, 3 April 2007 (*Brdanin Appeal Judgment*), paras 292-297; *Karadžić Trial Judgment*, paras 535-536.

- the denial of employment;<sup>515</sup>
- the invasion of privacy through arbitrary searches of homes;<sup>516</sup>
- unlawful arrest and detention;<sup>517</sup>
- the denial of the right to judicial process;<sup>518</sup> and
- the denial of equal access to public services (e.g., medical care).<sup>519</sup>

Additionally, it must be demonstrated that the deprivation was severe,<sup>520</sup> i.e., a serious, gross or blatant denial of fundamental rights.<sup>521</sup> Any act which, in and of itself, constitutes a crime against humanity will be considered a severe deprivation of fundamental rights.<sup>522</sup> In establishing this element, practitioners should assess whether or not rights have been clearly violated, how many individuals were targeted and to what extent individuals were deprived of their rights.<sup>523</sup>

### **3.2.12.2 Element Two: The Perpetrator Targeted Such Person or Persons by Reason of the Identity of a Group or Collectivity or Targeted the Group or Collectivity as Such**

To satisfy this element, practitioners should seek information showing that the perpetrator targeted the victims due to the identity of a group or collectively.<sup>524</sup> The targeted group can be defined in a positive or negative manner, meaning the perpetrator can target certain individuals or groups for not belonging to a certain group.<sup>525</sup>

The members of the group or collectivity must be merely ‘identifiable’, based either on objective criteria or the subjective notions or beliefs of the perpetrator regarding the victim’s membership in the relevant group or collectivity.<sup>526</sup>

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<sup>515</sup> *Stakić* Trial Judgment, paras 770-773; *Mladic* Trial Judgment, paras 3263-3266; *Brdanin* Trial Judgment, paras 1032-1041, 1049; *Brdanin* Appeal Judgment, paras 292-297; *Brdanin* Appeal Judgment, paras 292-297; *Karadzic* Trial Judgment, paras 535-536.

<sup>516</sup> *Mladic* Trial Judgment, paras 3263-3266; *Brdanin* Appeal Judgment, paras 292-297; *Karadzic* Trial Judgment, paras 535-536.

<sup>517</sup> *Mladic* Trial Judgment, paras 3263-3266; *Brdanin* Trial Judgment, paras 1044-1045, 1049; *Brdanin* Appeal Judgment, paras 292-297; *Karadzic* Trial Judgment, paras 517-521, 535-536.

<sup>518</sup> *Stakić* Trial Judgment, paras 770-773; *Mladic* Trial Judgment, paras 3263-3266; *Brdanin* Trial Judgment, paras 1044-1045, 1049; *Brdanin* Appeal Judgment, paras 292-297; *Karadzic* Trial Judgment, paras 535-536.

<sup>519</sup> *Stakić* Trial Judgment, paras 770-773; *Mladic* Trial Judgment, paras 3263-3266; *Brdanin* Trial Judgment, paras 1046-1049; *Brdanin* Appeal Judgment, paras 292-297; *Karadzic* Trial Judgment, paras 535-536.

<sup>520</sup> *Ongwen* Trial Judgment, para. 2733; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Judgment, 14 January 2000 (*Kupreškić et al.* Trial Judgment), paras 605, 617-619; *Blagojević & Jokić* Trial Judgment, para. 580; *Kordić and Čerkez* Appeal Judgment, para. 671; *Blaskić* Appeal Judgment, para. 135.

<sup>521</sup> *Ntaganda* Trial Judgment, para. 992; *Kupreškić et al.* Trial Judgment, paras 619-621.

<sup>522</sup> *Ntaganda* Trial Judgment, para. 991; *Ntaganda* Decision on the Confirmation of Charges, para. 58; *Kupreškić et al.* Trial Judgment, paras 605, 615; *Semanza* Trial Judgment, para. 349.

<sup>523</sup> *Ntaganda* Trial Judgment, para. 992; *Kupreškić et al.* Trial Judgment, paras 621-622; *Semanza* Trial Judgment, para. 349.

<sup>524</sup> *Ongwen* Trial Judgment, para. 2734; *Ntaganda* Trial Judgment, para. 988.

<sup>525</sup> *Ongwen* Trial Judgment, para. 2735; *Ntaganda* Trial Judgment, para. 1009.

<sup>526</sup> *Ongwen* Trial Judgment, para. 2736; *Ntaganda* Trial Judgment, paras 1010-1011; *Situation in Bangladesh/Myanmar* Authorisation Decision, para. 102; Triffterer & Ambos, *Commentary*, p. 221.



### 3.2.12.3 Element Three: Such Targeting was Based on Political, Racial, National, Ethnic, Cultural, Religious, Gender as Defined in Article 7, Paragraph 3, of the Statute, or Other Grounds that are Universally Recognized as Impermissible under International Law

In order to satisfy this element, practitioners should seek information that the perpetrator targeted the victims by discriminating against them on one of the following grounds:<sup>527</sup>

- **Political:** A group can be described as political if its participants share membership in a political party, ideological political beliefs, an actual or perceived opposition, or dissenting views, to a particular political regime.<sup>528</sup> This ground includes targeting by reason of personal political affiliations, whether actual or merely perceived as such by the perpetrator.<sup>529</sup> Persecution on political grounds “may include various categories of persons, such as: officials and political activists; persons of certain opinions, convictions and beliefs; persons of certain ethnicity or nationality”.<sup>530</sup>
- **Racial:** A racial group “is based on hereditary physical traits often identified with geography.”<sup>531</sup> Persecution based on racial grounds includes “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”.<sup>532</sup>
- **National:** The definition of a group based on national grounds is derived from characteristics that are “broader than citizenship and includes attributes of a group which considers that it is a nation even though the members of the group are located in more than one State”.<sup>533</sup> For example, a group of persons in a State may be targeted because they are nationals of another State.<sup>534</sup>
- **Ethnic:** An ethnic group can be defined as one that shares a “common language and culture”,<sup>535</sup> or a group which distinguishes itself as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others).<sup>536</sup>

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<sup>527</sup> Rome Statute, Article 7(1)(h).

<sup>528</sup> *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 37; *Ruto et al.* Decision on Confirmation of Charges, paras 273, 347; ICC, ‘Report on Preliminary Examination Activities’ (5 December 2019), para. 80.

<sup>529</sup> *Ongwen Trial Judgment*, para. 2737 (citing *Situation in Burundi Authorisation Decision*, para. 133; *Prosecutors v. Kaing Guek (alias Duch)*, 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012 (‘Dutch Appeal Judgment’), para. 272.

<sup>530</sup> *Duch Appeal Judgment*, para. 272.

<sup>531</sup> *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999 (‘Kayishema et al. Trial Judgment’), para. 98; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (‘Akayesu Trial Judgment’), para. 514.

<sup>532</sup> Triffterer & Ambos, *Commentary*, p. 224 (citing *International Convention on Elimination of All Forms of Racial Discrimination* (adopted in GA Res. 2106 A (XX) of 21 December 1965, entered into force 4 January 1969), Article 1).

<sup>533</sup> Triffterer & Ambos, *Commentary*, p. 224.

<sup>534</sup> *Gbagbo Decision on Confirmation of Charges*, para. 205; *Prosecutor v. Goudé*, ICC-02/11-02/11, Decision on the Confirmation of Charges, 11 December 2014 (‘Goudé Decision on the Confirmation of Charges’), para. 123; *Prosecutor v. Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor’s Application Pursuant to article 58 for a Warrant of Arrest Against Simone Gbagbo, 2 March 2012 (‘Simone Gbagbo Decision on Arrest Warrant’), para. 16. See also, P. Robinson, ‘Summary of Decisions of the International Criminal Court’ (February 2022), p. 73

<sup>535</sup> *Situation in Bangladesh/Myanmar Authorisation Decision*, para. 103; *Kayishema et al.* Trial Judgment, para. 98; *Akayesu Trial Judgment*, para. 513.

<sup>536</sup> *Kayishema et al.* Trial Judgment, para. 98.



For example, an ethnic group may be defined by virtue of its shared language, tribal customs and traditional links to its lands.<sup>537</sup>

- **Cultural:** A cultural group can be described as one that shares common customs, arts and social institutions.<sup>538</sup>
- **Religious:** A religious group can be defined as one whose members share the same religion, denomination, mode of worship or common beliefs.<sup>539</sup> Persecution on religious grounds includes the targeting of individuals based on: their chosen or perceived religious affiliation; their failure to adhere to the religious beliefs or precepts of the perpetrator; or their lack of a religion.<sup>540</sup>
- **Gender:** Under the Rome Statute, “gender’ refers to the two sexes, male and female, within the context of society”.<sup>541</sup> This is widely considered to include persecution on account of sexual orientation or gender identity.<sup>542</sup>
- **Other Grounds:** The insertion of “or other grounds” allows for persecution on grounds other than those expressly listed, provided that such grounds “are universally recognized as impermissible under international law”. The words ‘universally recognised’ should be understood as ‘widely recognised’; it does not mean that all States must have recognised a particular ground as impermissible in order for it to form a ground of persecution.<sup>543</sup> Such grounds may include age, sexual orientation or disability.<sup>544</sup>

As such, it must be established that the perpetrator deliberately targeted the victim *based on*, or *because*, they perceived the victim as belonging to a particular group or collectivity.<sup>545</sup> In other words, the severe deprivation of fundamental rights must have been carried out with the *intent* to discriminate against the person(s) based on one of the aforementioned grounds.<sup>546</sup> This intent may

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<sup>537</sup> *Prosecutor v. Bashir*, ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 137; *Ntaganda Decision on the Confirmation of Charges*, para. 58; *Prosecutor v. Ahmad Muhammad Harun (“Amad Harun”) and Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”)*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, 27 April 2007, para. 74; *Prosecutor v. Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12, Public redacted version of “Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein”, 1 March 2012, para. (i).

<sup>538</sup> Triffterer & Ambos, *Commentary*, p. 224.

<sup>539</sup> *Situation in Bangladesh/Myanmar Authorisation Decision*, para. 103; *Kayishema et al. Trial Judgment*, para. 98; *Akayesu Trial Judgment*, para. 515.

<sup>540</sup> Triffterer & Ambos, *Commentary*, p. 224. See e.g., *Gbagbo Decision on Confirmation of Charges*, para. 205; *Goudé Decision on the Confirmation of Charges*, para. 123; *Simone Gbagbo Decision on Arrest Warrant*, para. 16.

<sup>541</sup> Rome Statute, Article 7(3).

<sup>542</sup> ICC Policy Paper on Sexual and Gender Based Violence, June 2014, p. 3; R. Grey et al., ‘Gender-based Persecution as a Crime against Humanity: The Road Ahead’ (2019) *Journal of International Criminal Justice*, p. 14.

<sup>543</sup> Triffterer & Ambos, *Commentary*, p. 226.

<sup>544</sup> Schabas, *ICC: Commentary*, p. 198.

<sup>545</sup> *Ongwen Trial Judgment*, para. 2739 (citing *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Corr-Red, Decision on the Confirmation of Charges, 13 November 2019 (‘*Al Hassan Decision on the Confirmation of Charges*’), para. 671); *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment, 10 June 2010 (‘*Popović et al. Trial Judgment*’), para. 968. See also, Schabas, *ICC: Commentary*, p.172; *Karadžić Trial Judgment*, para. 500; *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 305; *Blaškić Appeal Judgment*, para. 129.

<sup>546</sup> *Ongwen Trial Judgment*, para. 2739.

be inferred from the general behaviour of the perpetrator, as well as the circumstances surrounding the commission of the crime.<sup>547</sup>

#### 3.2.12.4 Element Four: The Conduct was Committed in Connection with Any Act Referred to in Article 7, Paragraph 1, of the Statute or Any Crime Within the Jurisdiction of the Court

The conduct of the perpetrator that deprived the victims of their fundamental rights must have been committed in connection with another act enumerated in Article 7(1) (i.e., another crime against humanity listed in the Rome Statute) or any crime within the jurisdiction of the Court (i.e., genocide, war crimes or aggression).<sup>548</sup>

This essentially means that if there is an act which, in and of itself, is not a crime within the Rome Statute, but is carried out in connection with (or via) such crimes, the Court may still consider this conduct to amount to persecutory conduct.<sup>549</sup> For example, restrictions placed on a particular group to curtail their rights to participate in social life (i.e., visits to public parks, theatres or libraries), or hate speech targeting a portion of the population on discriminatory grounds, are not severe enough, in and of themselves, to amount to persecution. However, they may be considered persecutory acts when considered in the context of a widespread attack on the civilian population during which other crimes against humanity are being committed and must be weighed for their cumulative effect.<sup>550</sup> Any discriminatory measure that does not have such a connection, however, would not amount to the crime against humanity of persecution.<sup>551</sup>

#### 3.2.12.5 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator severely deprived, contrary to international law, one or more persons of</b>	<ul style="list-style-type: none"> <li>Did the perpetrator deprive one or more persons of their fundamental rights?</li> <li>Which fundamental rights was the victim(s) deprived of? Are these rights established in international human rights instruments or customary international law?</li> </ul>	<ul style="list-style-type: none"> <li>Witnesses testifying that they were subjected to inhumane living conditions while in detention centres run by Russian soldiers – they were not provided with sufficient food, water or medical care, and were kept in extremely cramped and unhygienic conditions – constituting a deprivation of the fundamental right to be free of mistreatment.</li> </ul>

<sup>547</sup> *Ongwen Trial Judgment*, para. 2739 (citing *Al Hassan Decision on the Confirmation of Charges*, para. 671); *Popović et al.*, para. 969; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgment, 28 February 2005 ('*Kvočka Appeal Judgment*'), para. 460.

<sup>548</sup> Rome Statute, Article 7(1)(h); ICC Elements of Crimes, Article 7(1)(h), Element 4. *See also*, *Situation in Burundi Authorisation Decision*, para. 131; *Ongwen Trial Judgment*, para. 2730; *Ntaganda Trial Judgment*, para. 1023.

<sup>549</sup> Schabas, ICC: *Commentary*, pp. 199-200; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeal Judgment, 28 November 2007 ('*Nahimana et al. Appeal Judgment*'), paras 985-988; *Kvočka Appeal Judgment*, para. 321; *Kupreškić et al. Trial Judgment*, paras 615(e), 622.

<sup>550</sup> *Nahimana et al. Appeal Judgment*, paras 985-988; *Kupreškić et al. Trial Judgment*, paras 615(e), 622.

<sup>551</sup> *Situation in Burundi Authorisation Decision*, para. 131.

<b>fundamental rights?</b>	<ul style="list-style-type: none"> <li>• Under what circumstances did the perpetrator deprive the victim(s) of their rights?</li> <li>• Was the deprivation of rights severe?</li> <li>• How many individuals were targeted?</li> <li>• To what extent were the victims deprived of their rights?</li> </ul>	<ul style="list-style-type: none"> <li>• An official municipal governmental report indicating that Ukrainian civilians were terrorised through killings, rapes, arbitrary house searches and looting constituting a deprivation of a range of fundamental rights including the right to life.</li> <li>• Forensic evidence from two grave sites providing evidence of the deaths of hundreds of men.</li> <li>• Video footage showing Russian soldiers razing Ukrainian civilian houses, infringing on the civilians' right to property.</li> <li>• A UN report on the "filtration" system used to process evacuees moved to Russian-held territory from Mariupol during which time civilians were arbitrarily detained and tortured.</li> </ul>
<b>Does the evidence show that the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such?</b>	<ul style="list-style-type: none"> <li>• Was the victim a member of any group or collectivity?</li> <li>• What are the identifiable characteristics of the group/collectivity to which the victim belonged?</li> <li>• Were the victims targeted due to the identity of the group/collectivity?</li> <li>• Did the perpetrator target the group or collectivity itself?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims testifying that they were tortured and subjected to long interrogation sessions by the Russian forces due to their pro-Ukrainian affiliation (also referred to by the Russians as "nazis", "fascists" and "banderovtsy").</li> <li>• A Russian military command report indicating that residents in a locality who identified as Ukrainian were to be targeted and killed, raped and their property pillaged.</li> <li>• Exhumation activities carried out in mass graves revealing that only the members of a particular ethnic group were killed by the perpetrators.</li> <li>• Videos of Russian forces going door-to-door looking for all the male inhabitants of a town and taking them to <i>ad hoc</i> detention centres established by the occupying administration.</li> <li>• A UN report on the targeting of Ukrainian citizens, perceived as being affiliated to the Ukrainian military and government, by Russian forces who abducted and detained these citizens and tortured and interrogated them for information on Ukraine's armed forces.</li> </ul>
<b>Does the evidence show that the targeting</b>	<ul style="list-style-type: none"> <li>• What were the reasons behind the deprivation of rights imposed upon the victims?</li> </ul>	<ul style="list-style-type: none"> <li>• Witnesses testifying that occupation administration leaders were instructing the perpetrators to kill the Ukrainian</li> </ul>

<p><b>was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law?</b></p>	<ul style="list-style-type: none"> <li>• Were the victims targeted based on political, racial, national, ethnic, cultural, religious or gender grounds? If not, was it based on any other similar grounds?</li> <li>• What are the indications that the deprivation of rights was based on one of the prohibited grounds?</li> <li>• Are there any indications that the perpetrator intended to discriminate against the victims in targeting them?</li> </ul>	<p>citizens because they supported the Ukrainian government.</p> <ul style="list-style-type: none"> <li>• Policies enacted by the occupation authorities regarding the arrest and detention of LGBTQI+ persons.</li> <li>• A UN report on the targeting of Ukrainian citizens perceived as being affiliated with the Ukrainian military and government, by Russian forces who abducted and detained these citizens and tortured and interrogated them for information on Ukraine's armed forces.</li> </ul>
<p><b>Does the evidence show that the conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court?</b></p>	<ul style="list-style-type: none"> <li>• What was the underlying act that caused the deprivation of fundamental rights of the victim?</li> <li>• Was the deprivation of fundamental rights committed by a single act or by a series of acts?</li> <li>• Was the conduct of the perpetrator connected with acts constituting a crime under the Rome Statute? If so, which one(s)?</li> </ul>	<ul style="list-style-type: none"> <li>• An investigation report indicating that victims were raped by Russian soldiers to prevent them from having Ukrainian children, indicating that their persecution was carried out in connection with the crime of rape.</li> <li>• Analysis conducted on the bodies of victims following exhumation revealing that they were subjected to torture before they were killed by the perpetrators, indicating that the victims may have been persecuted in connection with the crime of torture.</li> <li>• Photographs depicting the victims of killings with marks from weapons typically used by Russian forces, indicating that the perpetrators committed persecution in connection with the crime of murder.</li> </ul>

Table 20: Article 7(1)(h) Cues for Practitioners

### 3.2.13 Crime against Humanity of Enforced Disappearance (Convention for the Protection of all Persons from Enforced Disappearance; Article 7(1)(i), Rome Statute)

Enforced disappearance is prohibited by the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>552</sup> to which Ukraine is a State Party.<sup>553</sup> The Convention defines enforced disappearance as the “arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization,

<sup>552</sup> International Convention for the Protection of All Persons from Enforced Disappearance (23 December 2010 by UN General Assembly of the United Nations in its resolution 47/133).

<sup>553</sup> OHCHR, ‘Ratification of 18 International Human Rights Treaties’.

support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.<sup>554</sup>

In addition, Article 7(1)(i) of the Rome Statute prohibits the crime against humanity of enforced disappearance,<sup>555</sup> which is defined as “the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”.<sup>556</sup>

Currently, Ukrainian legislation does not criminalise the crime against humanity of enforced disappearance. It does, however, criminalise enforced disappearance as an ordinary crime under Article 146-1 of the Criminal Code of Ukraine (‘CCU’). The definition provided in Article 146-1 is similar to the Rome Statute and International Convention for the Protection of All Persons from Enforced Disappearance definitions. Specifically, the domestic crime of enforced disappearance involves “the arrest, detention, abduction or deprivation of liberty in any other form by a representative of a State, including a foreign one, with subsequent refusal to acknowledge the arrest, detention, abduction or deprivation of liberty in any other form or withholding the fate of such a person or place of residence”. However, the CCU provision does not require the act of enforced disappearance to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element). In addition, in line with the International Convention for the Protection of All Persons from Enforced Disappearance, but unlike the Rome Statute, Article 146-1 does not include the requirement of an intent to remove the victim from the protection of the law *for a prolonged period of time*. Nevertheless, it must still be proven that the victim was placed “outside the protection of the law”.<sup>557</sup>

Further, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of enforced disappearance under Article 442-1.1(6) of the CCU. Note 2 to Article 442-1 indicates that “[e]nforced disappearance in this article should be understood as the acts provided for in Article 146-1 of this Code”. The elements of this crime should be interpreted in line with the International Convention for the Protection of All Persons from Enforced Disappearance, the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>558</sup>

1. The perpetrator:

- (a) Arrested, detained or abducted one or more persons; or

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<sup>554</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

<sup>555</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 7(1)(i). *See also*, Inter-American Convention on Forced Disappearance of Persons (1994) OASTS 80; UNGA, ‘Declaration on the Protection of all Persons from Enforced Disappearance’, 18 December 1992, UN Doc. A/Ref/47/133.

<sup>556</sup> Rome Statute, Article 7(2)(i).

<sup>557</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Article 2. *See also*, R. Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn, CUP 2015), p. 260.

<sup>558</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 7(1)(i).

- (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
- 2.
  - (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
  - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
- 3. The perpetrator was aware that:
  - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
  - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
- 4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
- 5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
- 6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
- 7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- 8. The perpetrator knew that the conduct was part of or intended the conduct to be a part of a widespread or systematic attack directed against a civilian population.

As can be seen from the above description of the elements, the crime of enforced disappearance is a complex one and we do not have the benefit of extensive ICL jurisprudence to explain each one.

The crime of enforced disappearance under the Rome Statute allows one, or several persons, to be prosecuted at different stages of the disappearance.<sup>559</sup> In sum, the crime consists of two major alternative types of conduct – deprivation of liberty (Element 1(a) or Element 2(b)) and withholding of information (Element 1(b) or Element 2(a)). Thus, there are two primary ways in which a perpetrator may be involved in the enforced disappearance that would lead to responsibility for the crime (where the remaining elements are also satisfied):

1. A **perpetrator who arrested, detained or abducted one or more persons** (Element 1(a)), where this conduct was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons (Element 2(a)) which the perpetrator knew would occur in the ordinary course of events (Element 3(a)).
2. A **perpetrator who refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person(s)** (Element 1(b)), where this

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<sup>559</sup> K. Kittichaisaree, *International Criminal Law* (OUP, 2001) p. 123.



conduct was proceeded or accompanied by a deprivation of freedom (Element 2(b)) of which the perpetrator was aware (Element 3(b)).

Accordingly, depending on the facts, in making their charging decisions, a national or international prosecutor will either apply Elements 1(a), 2(a) and 3(a) **OR** Elements 1(b), 2(b) and 3(b) (*see below*).

### **3.2.13.1 A Perpetrator who Arrested, Detained, or Abducted One or More Persons**

#### 3.2.13.1.1 Element 1(a): The Perpetrator Arrested, Detained or Abducted One or More Persons

To satisfy Element 1(a), practitioners must establish that the perpetrator's conduct deprived a person or persons of their liberty. This could be conducted through "arrest, detention or abduction", although it may also encompass "any form of deprivation of liberty of a person against his or her will".<sup>560</sup> This includes situations in which the individual was initially arrested or detained lawfully, but later disappeared in custody.<sup>561</sup>

The word 'detained' is intended to include perpetrators who maintain an existing detention.<sup>562</sup> In other words, the perpetrator does not need to be involved in the initial arrest or abduction.

#### 3.2.13.1.2 Element 2(a): Such Arrest, Detention or Abduction was Followed or Accompanied by a Refusal to Acknowledge that Deprivation of Freedom or to Give Information on the Fate or Whereabouts of Such Person(s)

Practitioners should next seek information showing that the abduction was accompanied by a "refusal to acknowledge or provide information", which includes situations in which the perpetrator denies outright that an arrest, detention or abduction has taken place, and situations in which they provide misleading or obfuscatory information regarding the fate or whereabouts of an individual.<sup>563</sup>

#### 3.2.13.1.3 Element 3(a): The Perpetrator was Aware that the Arrest, Detention or Abduction would be Followed in the Ordinary Course of Events by a Refusal to Acknowledge that Deprivation of Freedom or to Give Information on the Fate or Whereabouts of such Person(s)

To satisfy this element, practitioners should seek information showing that the perpetrator was aware that the arrest or detention would be followed in the ordinary course of events by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of such person or persons. Nevertheless, for this crime to have been committed, the perpetrator must have

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<sup>560</sup> *Situation in the Republic of Burundi*, ICC-01/17-X-9-US-Exp, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Burundi, 25 October 2015 ('Burundi Decision'), para. 118. *See also*, *Situation in Côte d'Ivoire*, ICC/02/11, Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 15 November 2011, paras 77-82; UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006 entry into force 23 December 2010) A/RES/61/177 ('International Convention for the Protection of All Persons from Enforced Disappearance'), Article 2.

<sup>561</sup> ICC Elements of Crimes, fn. 26; Burundi Decision, para. 118.

<sup>562</sup> ICC Elements of Crimes, fn. 25.

<sup>563</sup> Burundi Decision, para. 118.

committed the acts of enforced disappearance with intent and knowledge, as well as with the awareness outlined in this element.<sup>564</sup>

The level of awareness required would exclude from the scope of application the police officer acting in good faith, but would include those who are aware of the likelihood of a ‘disappearance’ even if they do not know specifically of any subsequent refusal to provide information.<sup>565</sup> Where the perpetrator maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.<sup>566</sup>

### **3.2.13.2 A Perpetrator who Refused to Acknowledge the Arrest, Detention or Abduction, or to give Information on the Fate or Whereabouts of such Person(s)**

#### **3.2.13.2.1 Element 1(b): The Perpetrator Refused to Acknowledge the Arrest, Detention or Abduction, or to Give Information on the Fate or Whereabouts of Such Person or Persons**

This element is satisfied where a perpetrator, who was not involved in the initial arrest, detention or abduction, subsequently refuses to provide acknowledgement of the detention or information on the fate or whereabouts of the victim.

For more information on establishing this element, see Element 2(a).

#### **3.2.13.2.2 Element 2(b): Such refusal was preceded or accompanied by that deprivation of liberty**

To establish this element practitioners must demonstrate that the perpetrator’s refusal to acknowledge the arrest, detention or abduction or to give information on the fate or whereabouts of the victim was preceded or accompanied by that deprivation of liberty.

For more information on establishing this element, see Element 1(a).

#### **3.2.13.2.3 Element 3(b): The Perpetrator was Aware that Such Refusal was Preceded or Accompanied by that Deprivation of Freedom**

To satisfy this element, it must be established that the perpetrator was aware that refusal was preceded or accompanied by the deprivation of freedom.

For more information on establishing this element, see Element 3(a).

### **3.2.13.3 Common Elements**

The following elements need to be established irrespective of whether a person is responsible for the arrest, detention or abduction OR is responsible for refusing to acknowledge the fate of the disappeared person or to provide accurate information.

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<sup>564</sup> ICC Elements of Crimes, fn. 27 and General Introduction, para. 2

<sup>565</sup> G. Witschel and W. Rückert in R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), p. 103.

<sup>566</sup> ICC Elements of Crimes, fn. 28.

3.2.13.3.1 Element Four: Such Arrest, Detention or Abduction was Carried out by, or with the Authorization, Support or Acquiescence of, a State or a Political Organization

This element requires the arrest, detention or abduction to have been perpetrated by, or with the support or authorisation of, a State or political organisation.<sup>567</sup> Practitioners should seek information showing that the enforced disappearance was associated with the actions of the police or armed forces, a State's security service, or groups that are implementing State policies.<sup>568</sup>

3.2.13.3.2 Element Five: Such Refusal to Acknowledge that Deprivation of Freedom or to Give Information on the Fate or Whereabouts of such Person or Persons was Carried out by, or with the Authorization or Support of, such State or Political Organization

In connection with Element Four, this element requires that the State or political organisation must have also carried out, authorised or supported the refusal to acknowledge the deprivation of freedom.<sup>569</sup>

For example, in *Velasquez-Rodriguez v. Honduras*, the Inter-American Court of Human Rights found that the disappearance of Velásquez “was carried out by agents who acted under cover of public authority”.<sup>570</sup> The conduct of the authorities referred to by the Court includes: the systematic denial by the authorities of any knowledge of the detention, whereabouts or fate of the victim when queried by the victim's relatives, lawyer, etc.; the inability of military or government officials to prevent/investigate the disappearance, punish those responsible or help those interested discover the whereabouts and fate of the victim or the location of the remains; the lack of results produced by the investigative committee created by the government and military; and the fact that the judicial proceedings brought were processed slowly with a clear lack of interest, or dismissed entirely.<sup>571</sup>

3.2.13.3.3 Element Six: The Perpetrator Intended to Remove Such Person or Persons from the Protection of the Law for a Prolonged Period of Time

To satisfy this element, practitioners must first establish that the perpetrator intentionally deprived the person or persons of their liberty in order to remove them from the protection of the law. This includes situations in which a victim is prevented from accessing judicial assistance or legal procedures.<sup>572</sup> Practitioners should consider the means by which the individual is deprived of their liberty. Relevant considerations in this regard include, for example: abduction in unmarked cars with tinted windows,<sup>573</sup> capture or detention in desolate areas<sup>574</sup> or unofficial prisons;<sup>575</sup> or failure to

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<sup>567</sup> Burundi Decision, para. 119.

<sup>568</sup> When establishing a State/organisational nexus, it should be stressed that internal political instability or any other public emergency *may not* be invoked to justify the conduct of State agents: Burundi Decision, para. 119.

<sup>569</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Article 2; ICC Elements of Crimes, Article 7(1)(i).

<sup>570</sup> *Velasquez-Rodriguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988 (“*Velasquez-Rodriguez v. Honduras* Judgment”), para. 182.

<sup>571</sup> *Velasquez-Rodriguez v. Honduras* Judgment, paras 118, 147(d)(iv), 147(d)(v). Similarly, see, *Godínez-Cruz v. Honduras*, Inter-American Court of Human Rights, Judgment of 28 January 1989, paras 124, 153(d)(iv), 153(d)(v), 192.

<sup>572</sup> Burundi Decision, para. 120, fn. 305 and references cited therein.

<sup>573</sup> *Velasquez-Rodriguez v. Honduras*, paras 99-100; *Godínez-Cruz v. Honduras*, paras 106, 110.

<sup>574</sup> *Godínez-Cruz v. Honduras*, para. 154(b)(iii).

<sup>575</sup> *Godínez-Cruz v. Honduras*, para. 153(d)(iii).

register detainees' names.<sup>576</sup> Similarly, other indicators may include the absence of any arrest warrant, the absence of records relating to detention, the absence of any criminal charge and the absence of information that any victim(s) were brought before a competent court or prosecuted (among others).<sup>577</sup>

Second, it must be proven that the perpetrator intended to remove the victim from the protection of the law *for a prolonged period of time*. Although the precise period that will satisfy this requirement has not been authoritatively clarified by the ICC, it has held that several months or years would definitely fulfil this element.<sup>578</sup>

However, as mentioned in the green box above, this requirement that the perpetrator intended to remove the victim from the protection of the law *for a prolonged period of time* is unique to the Rome Statute.<sup>579</sup> Indeed, the Working Group on Enforced Disappearances has recommended that “the definition of enforced disappearance provided for by the Rome Statute be interpreted by the national authorities in line with the more adequate definition provided for in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance”,<sup>580</sup> which requires only that the person(s) are placed “outside the protection of the law”.<sup>581</sup>

Accordingly, *any* detention involving an individual's removal from the protection of the law, even in the short term, will be sufficient to satisfy the definition of enforced disappearance for the purpose of domestic Ukrainian prosecutions of this crime.<sup>582</sup> Consequently, even a period of days could be sufficient in this regard, particularly where the purpose of the detention was, for example, to effectuate that individual's execution.

#### 3.2.13.4 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Option One: A perpetrator who arrested, detained or abducted one or more persons (Elements 1(a), 2(a), 3(a))</b>		
<b>Does the evidence show that the perpetrator arrested, detained or</b>	<ul style="list-style-type: none"> <li>Was an individual arrested? What were the circumstances of the arrest?</li> <li>Was a person abducted? What were the circumstances of the abduction?</li> </ul>	<ul style="list-style-type: none"> <li>A military document listing the names of all individuals who have been arrested and detained over a certain period of time at a Russian detention centre.</li> </ul>

<sup>576</sup> Burundi Decision, para. 120.

<sup>577</sup> Trial International, Enforced Disappearance.

<sup>578</sup> Burundi Decision, para. 120.

<sup>579</sup> Rome Statute, Article 7(2)(i).

<sup>580</sup> Report of the Working Group on Enforced or Involuntary Disappearances, ‘Best practices on enforced disappearances in domestic criminal legislation’ (28 December 2010) A/HRC/16/48/Add.3, para. 15.

<sup>581</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

<sup>582</sup> UNCHR Working Group on Enforced or Involuntary Disappearances, ‘Crimes Against Humanity: Information Provided to the International Law Commission’ (2019) 71<sup>st</sup> Session of the International Law Commission.

<p><b>abducted one or more persons?</b></p>	<ul style="list-style-type: none"> <li>• Was a person detained? For how long where they detained?</li> <li>• Was a person arrested and detained lawfully, but then subsequently disappeared while in detention?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how a person had a black bag thrown over their head and was forced into a car by Russian soldiers while walking down a street.</li> <li>• Satellite images of a prison or detention complex.</li> <li>• Witness testimony from the victim's relatives or friends describing how they have not seen the victim for a number of weeks.</li> <li>• A photograph of a person placed in handcuffs by Russian soldiers.</li> <li>• Reports regarding the abduction by Russian soldiers of a member of the Korabelny District Council. The victim's wife was told that he would be released the day after his abduction, but he remains missing.</li> </ul>
<p><b>Does the evidence show that the deprivation of liberty was followed by a refusal to provide accurate information?</b></p>	<ul style="list-style-type: none"> <li>• Was any information provided regarding the status or whereabouts of the victim following their arrest?</li> <li>• Did the relatives of the victim make any formal requests for information to the police or law enforcement officials?</li> <li>• Did law enforcement officers publicly deny that the victim had been arrested or detained?</li> <li>• Are the whereabouts of the victim now known?</li> <li>• For how long has the fate of the victim been concealed?</li> <li>• Was false information provided about the fate or whereabouts of the victim?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a relative of the victim describing how they have made multiple requests to the Russian authorities for information on the victim's whereabouts, but they have been repeatedly denied.</li> <li>• Testimony of the family of a Ukrainian activist who disappeared indicating that they had received no official information regarding his whereabouts.</li> <li>• A letter from the Russian commander denying the victim was held in a detention centre.</li> <li>• A press conference recording in which a Russian officer publicly denied any knowledge of the victim's whereabouts.</li> <li>• A UN report detailing accounts of individuals who were arrested and have since been missing.</li> <li>• Witness testimony describing false information provided about the whereabouts of their son by a member of the Russian armed forces.</li> </ul> <p>UN Human Rights Monitoring Mission report regarding 43 incidents of enforced disappearances in Crimea since the start of the Russian occupation, indicating that some cases began with what was ostensibly a legal arrest at the initial stages of the deprivation of liberty but ultimately culminated in an undeclared detention and concealment of whereabouts of the victim.</p>

<p><b>Does the evidence show that the perpetrator knew that the deprivation of liberty would be followed by a refusal to provide information in the ordinary course of events?</b></p>	<ul style="list-style-type: none"> <li>• Did the perpetrator know that the whereabouts of the victim was being concealed?</li> <li>• Do the surrounding circumstances suggest that there was a likelihood that a refusal to provide information would follow?</li> </ul>	<ul style="list-style-type: none"> <li>• Records showing that the Russian authorities took the victim to a detention centre hundreds of miles away from where they were arrested.</li> <li>• Witness testimony that Russian soldiers used a car with blacked out windows to make the arrest.</li> <li>• An order from the commander of the Russian detention centre to the perpetrator who was detaining the victim that they had refused to provide information to the victim's family.</li> <li>• An NGO report indicating that enforced disappearances were widely used by the Russian armed forces in Ukraine.</li> </ul>
<p><b>OR Option 2: A perpetrator who refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person(s) (Elements 1(b), 2(b), 3(b))</b></p>		
<p><b>Does the evidence show that the perpetrator refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person(s)?</b></p>	<ul style="list-style-type: none"> <li>• Was any information provided regarding the status or whereabouts of a person(s) following their arrest?</li> <li>• Did relatives of the victim request any information from regarding the fate or whereabouts of the victim?</li> <li>• Did the perpetrator publicly deny that a person had been arrested and/or detained?</li> <li>• Is the fate or whereabouts of the victim still unknown?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a relative of the victim describing how they have made multiple requests to the Russian authorities for information on the victim's whereabouts, but they have been repeatedly denied.</li> <li>• A letter signed by the perpetrator to the family of the Russian authorities providing false information on the victim's whereabouts.</li> <li>• Witness testimony that a member of the Russian authorities had provided them false information about the whereabouts of their son.</li> </ul>
<p><b>Does the evidence show that the perpetrator arrested, detained or abducted a person(s)?</b></p>	<ul style="list-style-type: none"> <li>• Was an individual arrested? What were the circumstances of the arrest?</li> <li>• Was a person abducted? What were the circumstances of the abduction?</li> <li>• Was a person detained? How long where they detained?</li> <li>• Was a person arrested and detained lawfully, but then subsequently disappeared while in detention?</li> </ul>	<ul style="list-style-type: none"> <li>• A military document listing the names of all individuals who have been arrested and detained over a certain period of time Russian military detention centre.</li> <li>• Witness testimony describing how a person had a black bag thrown over their head and was forced into a car by police officers while walking down a street.</li> <li>• Reports regarding the abduction by Russian soldiers of a member of the Korabelny District Council. The victim's wife was told that he would be released the day after his abduction, but he remains missing.</li> <li>• Satellite images of a prison or detention complex.</li> <li>• Witness testimony from the victim's relatives or friends describing how they have not seen the victim for a number of weeks.</li> </ul>



		<ul style="list-style-type: none"> <li>• A photograph of a person placed in handcuffs by law enforcement officers.</li> </ul>
<p><b>Does the evidence show that the perpetrator knew that the refusal was preceded or accompanied by that deprivation of freedom?</b></p>	<ul style="list-style-type: none"> <li>• Did the perpetrator know that the victim was arrested, detained or abducted?</li> <li>• Do the surrounding circumstances allow an inference that the perpetrator would have known about the deprivation of liberty?</li> </ul>	<ul style="list-style-type: none"> <li>• A detention centre register signed by the Russian commander with the name of the victim.</li> <li>• Insider witness testimony that the perpetrator was aware that the victim was detained by law enforcement.</li> <li>• Local news reports describing the abduction of the high-profile victim.</li> <li>• Witness testimony that the Russian soldier had met the victim in detention prior to refusing to give information about his whereabouts.</li> <li>• An order signed by the Russian commander ordering his unit to deny all knowledge of the victim's detention.</li> </ul>
<b>Common Elements</b>		
<p><b>Does the evidence show that a State or political organisation was involved in the deprivation of liberty, and the subsequent refusal to provide information?</b></p>	<ul style="list-style-type: none"> <li>• Who arrested the victim? Were they in police uniform? Did they appear to belong to one of the official law enforcement agencies of the State?</li> <li>• Was the victim arrested and detained by members of a political organisation?</li> <li>• Was the victim presented with a warrant of arrest before they were arrested?</li> <li>• Where was the person taken after they were initially arrested? Were they taken to a police station?</li> <li>• What language were the arresting officers speaking? Were they speaking the language of the Occupying Power?</li> <li>• Who refused to provide information on the whereabouts of the victim? Did they belong to a State authority?</li> </ul>	<ul style="list-style-type: none"> <li>• A photograph of a person in handcuffs being placed in an unmarked vehicle by people in Russian military uniform.</li> <li>• Witness testimony from the victim's family member describing how the arresting officer displayed an official badge before arresting the victim at their home.</li> <li>• Satellite imagery showing a Russian military vehicle driving to a hidden location after arresting a person.</li> <li>• Video footage of a soldier describing that the whereabouts of the victim are unknown.</li> <li>• An official State security report detailing the arrest of the victim, whose whereabouts are now unknown.</li> <li>• An NGO report describing the details of a "filtration" regime systematically executed by occupying Russian forces, as part of which some civilians were detained and disappeared.</li> <li>• Reports from UN and other international organisations describing the widespread nature of enforced disappearances, such as, an OHCHR report discussing incidents of enforced disappearances across numerous geographical areas in Ukraine.</li> </ul>
<p><b>Did the perpetrator intend to remove the victim from the</b></p>	<ul style="list-style-type: none"> <li>• How was the victim initially deprived of their liberty? Were they placed in an unmarked vehicle, for instance?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how the victim was taken by people wearing Russian military uniforms who placed the victim in a car with blacked-out windows.</li> </ul>

<p><b>protection of the law for a prolonged period of time?</b></p>	<ul style="list-style-type: none"> <li>• Where was the victim taken?</li> <li>• Was the arrest logged in any official records?</li> <li>• Was the victim detained in an unofficial detention centre?</li> <li>• Was the victim taken to an isolated or remote location?</li> <li>• Did the victim appear in Court? Were they given the opportunity to have legal representation?</li> </ul>	<ul style="list-style-type: none"> <li>• Satellite imagery of an unofficial detention centre.</li> <li>• A report written by a local civil society organisation recording multiple incidents of individuals being arrested and taken away to remote locations.</li> <li>• Witness testimony from the victim's relatives describing how they have not seen the victim for several months.</li> <li>• Official prison documents listing the victim as present at a certain detention centre where they have never been held.</li> <li>• News reports and video evidence regarding the abduction of the Mayor of Melitopol by Russian forces who broke into the town hall, put a black bag over the Mayor's head, forced him out of his office, and put him in a car and drove him away in an unknown direction.</li> </ul>
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Table 21: Article 7(1)(i) Cues for Practitioners

### 3.2.14 Crime against Humanity of Other Inhumane Acts (Article 7(1)(k), Rome Statute)

Article 7(1)(k) of the Rome Statute prohibits the crime against humanity of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.<sup>583</sup>

Other inhumane acts as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of “moderate or severe bodily injury” under Article 442-1.1(9) of the Criminal Code of Ukraine. While the wording is somewhat different from that contained in the Rome Statute (i.e., “moderate or severe bodily injury” compared to “great suffering, or serious injury to body or to mental or physical health”), this provision

<sup>583</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 7(1)(k). The crime against humanity of other inhumane acts is also prohibited in the following international legal instruments: UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 (‘Nuremberg Charter’), Article 6(c); UN, International Military Tribunal for the Far East Charter (19 January 1946), TIAS 1589 (‘Tokyo Charter’), Article 5(c); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 5(i); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 3(i); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 2(i); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 (‘ECCC Law’), Article 5. Other inhumane acts is also prohibited as a war crime under Article 8(2)(a)(ii) of the Rome Statute.

should be interpreted to integrate both the contextual elements and the specific elements of the crime against humanity of other inhumane acts contained in the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>584</sup>

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

#### ***3.2.14.1 Element One: The Perpetrator Inflicted Great Suffering, or Serious Injury to Body or to Mental or Physical Health, by Means of an Inhumane Act***

To establish this element, practitioners should seek information demonstrating the following: (i) the victim suffered serious bodily or mental harm; and (ii) the suffering was the result of an act or omission of the perpetrator.<sup>585</sup>

*Serious* bodily or mental harm goes beyond temporary unhappiness, embarrassment or humiliation.<sup>586</sup> Additionally, while there is no requirement for the harm caused to be permanent or irremediable, it must result in grave and long-term disadvantage to a person's ability to lead a normal and constructive life.<sup>587</sup>

To assess the severity of the suffering or injury, the following should be taken into account:<sup>588</sup>

- The nature, duration and context of the infliction of pain;
- The premeditation and institutionalisation of the ill-treatment;
- The manner and method used by the perpetrator to cause the pain;
- The victim's age, sex and state of health;
- The position of inferiority of the victim;

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<sup>584</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 7(1)(k).

<sup>585</sup> *Katanga & Chui Confirmation of Charges*, paras 454; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 117; ; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001 ('Krstić Trial Judgment'), para. 412.

<sup>586</sup> *Krstić Trial Judgment*, para. 513; *Prosecutor v. Krnojelac*, IT-97-25, Trial Judgment, 15 March 2002 ('Krnojelac Trial Judgment'), para. 130; *Kordić and Čerkez Appeals Judgment*, para. 117; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 ('Akayesu Trial Judgment'), para. 503.

<sup>587</sup> *Krstić Trial Judgment*, para. 513; *Akayesu Trial Judgment*, para. 502.

<sup>588</sup> *Prosecutor v. Krnojelac*, IT-97-25, Trial Judgment, 15 March 2002 ('Krnojelac Trial Judgment'), para. 182; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001 ('Kvočka et al. Trial Judgment'), paras 143, 149, 151; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Judgment, 29 May 2013 ('Prlić et al. Trial Judgment'), para. 78; *Popović et al. Appeal Judgment*, para. 763; *Blagojević & Jokić Trial Judgment*, para. 627; *Akayesu Trial Judgment*, para. 688.

- The physical and mental effect of the treatment on the victim; and
- The specific social, cultural and religious background of the victim.

### **3.2.14.2 Element Two: Such Act was of a Character Similar to Any Other Act Referred to in Article 7, Paragraph 1, of the Statute**

The second element requires the act in question to be of a similar character (i.e., nature and gravity) to other crimes against humanity listed under Article 7(1) of the Rome Statute (i.e., murder, torture, extermination, enslavement, deportation or forcible transfer of population, imprisonment, sexual violence, etc.).<sup>589</sup> Similarly, the ICTY and ICTR require that, for an act to amount to the crime against humanity of other inhumane acts, it must be of similar seriousness to the other crimes against humanity enumerated within each tribunal's statute.<sup>590</sup> Ordinarily, this will require the conduct to represent a serious violation of customary international law or basic norms of international human rights law.<sup>591</sup>

The following non-exhaustive list of acts have been deemed as qualifying as 'other inhumane acts' before international tribunals:

- Forcible circumcision and penile amputation;<sup>592</sup>
- Being chased and struck with machetes;<sup>593</sup>
- Being forced to witness the killing of family members;<sup>594</sup>
- Sniping civilians;<sup>595</sup>
- Forced marriage;<sup>596</sup>
- Detention under severe conditions (e.g., lack of adequate food, hygiene and medical care);<sup>597</sup>
- Forced undressing in public and making the victim sit in the mud, march or perform exercises;<sup>598</sup>
- Open humiliation, beatings and infliction of injuries;<sup>599</sup>

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<sup>589</sup> ICC Elements of Crimes, Article 7(1)(k), fn. 30. See also, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('Ongwen Trial Judgment'), para. 2747.

<sup>590</sup> *Blagojevic & Jokic* Trial Judgment, para. 626; *Kordic & Cerkez* Appeal Judgment, para. 117; *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999, paras 150-151; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Muvunyi's Motion for Judgment of Acquittal, 13 October 2005, para. 72.

<sup>591</sup> *Katanga & Chui* Confirmation of Charges, para. 448.

<sup>592</sup> *Prosecutor v. Kenyatta et al.*, ICC-01/09-02/11, Decision on Confirmation of Charges, 23 January 2012 ('Kenyatta et al. Decision on Confirmation of Charges'), para. 270.

<sup>593</sup> *Kenyatta et al.* Decision on Confirmation of Charges, para. 272.

<sup>594</sup> *Kenyatta et al.* Decision on Confirmation of Charges, paras 274-277.

<sup>595</sup> *Prosecutor v. Stanislav Galic*, IT-98-29-A, Appeal Judgment, 30 November 2006, para. 158.

<sup>596</sup> *Ongwen* Trial Judgment, paras 2741, 2744; *Prosecutor v. Chea and Samphan*, 002/19-09-2007-ECCC-TC, Trial Judgment, 16 November 2018, paras 740-749.

<sup>597</sup> *Prosecutor v. Prlic et al.*, Trial Judgment, IT-04-74-T, 29 May 2013, para. 80; *Krnojelac* Trial Judgment, para. 133; *Kvočka et al.* Trial Judgment, para. 209; *Prosecutor v. Kaing Guek Eav (alias Duch)*, 001/18-07-2007/ECCC/TC, Trial Judgment, 26 July 2010, para. 372.

<sup>598</sup> *Akayesu* Trial Judgment, para. 697.

<sup>599</sup> *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgment and Sentence, 12 September 2006, para. 530.

- Mutilation of a dead body that caused mental suffering to eye-witnesses;<sup>600</sup> and
- Desecration of corpses.<sup>601</sup>

### 3.2.14.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established the Character of the Act

Practitioners must show that the perpetrator was aware of the factual circumstances that established the character (i.e., the nature and gravity) of the inhumane act committed against the victim(s).<sup>602</sup> However, this does not require the perpetrator to be aware of the legal character of the act in question, i.e., there is no need for the perpetrator to know that the act in question constituted a crime against humanity or an inhumane act.<sup>603</sup>

### 3.2.14.4 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all crimes against humanity, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<p><b>Does the evidence show that the perpetrator intentionally inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act? Was the act of a character similar to other crimes against humanity?</b></p>	<ul style="list-style-type: none"> <li>• Have one or more persons been subjected to great suffering, or serious injury to body or to mental or physical health?</li> <li>• Was the harm rendered severe by the method or circumstances of its infliction?</li> <li>• What kind of suffering or injury did the perpetrator inflict on the victim? Physical, mental or both?</li> <li>• What was the gender/age/physical condition of the victim? Did they have any characteristics (child, elderly, pregnant, disabled, etc.) that made them particularly vulnerable?</li> <li>• Did the harm suffered by the victim have a negative and long-term effect on their ability to lead a normal life?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that after being detained by Russian soldiers, they were placed in cramped and overcrowded facilities along with other Ukrainian civilians, and not provided access to food, water and medical care, and subjected to unsanitary conditions.</li> <li>• A medical report listing cases of injury (cuts, gunshot wounds and blunt force trauma) that were treated at a hospital.</li> <li>• A victim testifying that, during their detention by the Russian armed forces, they were forced to strip naked and stand in front of others for hours.</li> <li>• A video of Russian soldiers intimidating and humiliating Ukrainian detainees.</li> <li>• A witness testifying that they saw Russian soldiers forcibly separate Ukrainian children from their families and put them on a bus.</li> <li>• A report by an international organisation indicating that 365 Ukrainian civilians, including 70 children, were confined for 28 days in the basement of a local school by the Russian armed forces.</li> </ul>

<sup>600</sup> *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, paras 934-936.

<sup>601</sup> *Prosecutor v. Bagosora & Nsengiyuma*, ICTR-98-41-A, Appeal Judgment, 14 December 2011, para. 729.

<sup>602</sup> *Katanga & Chui Confirmation of Charges*, para. 455.

<sup>603</sup> *Ongwen Trial Judgment*, para. 2753.

<p><b>Does the evidence show that the perpetrator was aware of the factual circumstances that established the character of the act?</b></p>	<ul style="list-style-type: none"> <li>• Are there circumstances surrounding the commission of the inhumane act which indicate that the perpetrator was aware of the factual circumstances that established the character of the act?</li> <li>• Did the perpetrator personally commit the inhumane act?</li> <li>• Was the perpetrator present at the crime scene at the time of the commission of the inhumane act?</li> <li>• Did the perpetrator interact with the victims or clearly see who they were?</li> </ul>	<ul style="list-style-type: none"> <li>• Witnesses testifying that the perpetrator was present at the crime scene when the victims were mutilated by the attackers.</li> <li>• Intercepted phone conversations between Russian soldiers discussing how they were ordered to question and torture Ukrainian soldiers and civilians before shooting them.</li> <li>• Photographs and video evidence depicting the perpetrator at the crime scene in the aftermath of a massacre committed at a civilian village.</li> <li>• Footage displayed on a national Russian news channel that depicts civilians being beaten and starved in a detention facility.</li> <li>• Video footage of Russian soldiers referring to Ukrainian civilians using slurs (i.e., “nazis” or “banderovtsy”).</li> <li>• Media reports indicating that a Russian commander was aware of the atrocities committed by his subordinates against the civilians which forced them to leave their homes.</li> </ul>
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Table 22: Article 7(1)(k) Cues for Practitioners

### 3.2.15 War Crime of Wilful Killing (Article 8(2)(a)(i), Rome Statute)

Article 8(2)(a)(i) of the Rome Statute prohibits the wilful killing of a protected person in an international armed conflict.<sup>604</sup>

<sup>604</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(a)(i). The Rome Statute also criminalises killing as a war crime in non-international armed conflicts under Article 8(2)(c)(i) and as a crime against humanity under Article 7(1)(a). The war crime of murder is also prohibited in the following international legal instruments: UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 ('Nuremburg Charter'), Article 6(b); UN, International Military Tribunal for the Far East Charter (19 January 1946), TIAS 1589 ('Tokyo Charter'), Article 5(b); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 2(a); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 4(a); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 3(a); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 6. Additionally, the war crime of murder is customary in nature: ICRC, Customary IHL Database, Rule 89. Violence to Life.



While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to wilful killing as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). "[W]ilful killing" of a protected person is classified as a grave breach of the Geneva Conventions.<sup>605</sup> As Ukraine is a party to the Geneva Conventions, this conduct, if committed against persons protected by the Geneva Conventions, can be charged as wilful killing under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of "committing a premeditated murder in connection with an international armed conflict or a non-international armed conflict against a person under the protection of international humanitarian law" under Article 438.3 of the CCU. This provision covers substantially the same contextual elements and specific elements of the crime of wilful killing as a war crime contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>606</sup>

1. The perpetrator killed (or caused the death of) one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### **3.2.15.1 Element One: The Perpetrator Killed (or Caused the Death of) One or More Persons**

Firstly, practitioners should seek information proving that one or more persons were killed by the perpetrator, i.e., that the perpetrator caused their death.<sup>607</sup> To establish that the perpetrator *killed or caused the death of* one or more persons, the information must demonstrate that: (i) a person is dead; and (ii) there is a causal link between the perpetrator's unlawful act or omission and that person's death.<sup>608</sup>

The death of the victim can be established either by identification of the victim's corpse<sup>609</sup> or by making inferences from the circumstances, such as:<sup>610</sup>

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<sup>605</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

<sup>606</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(a)(i).

<sup>607</sup> ICC Elements of Crimes, Article 8(2)(a)(i), fn. 31.

<sup>608</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('Ongwen Trial Judgment'), para. 2696; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 ('Bemba Trial Judgment'), paras 87-88; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 ('Katanga Trial Judgment'), paras 767-769; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, ('Katanga & Chui Decision on the Confirmation of Charges'), para. 287; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on Confirmation of Charges, 15 June 2009 ('Bemba Decision on Confirmation of Charges'), para. 132.

<sup>609</sup> *Bemba Decision on Confirmation of Charges*, para. 132.

<sup>610</sup> *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Trial Judgment, 20 July 2009, para. 904.

- The lack of contact by the victim with family or friends;
- The fact that the victim was last seen in an area that was attacked;
- The existence of a pattern of mistreatment of other victims by the perpetrators; and
- The coinciding or nearly coinciding time of death of other victims.

Where the case relies on circumstantial evidence to establish that a killing has taken place, it is not required to show the exact number,<sup>611</sup> nor precise identity<sup>612</sup> of the alleged victims, as long as their death is the only reasonable conclusion that can be drawn from the evidence.<sup>613</sup>

Proof that the perpetrator has killed or caused the death of a person or persons, can be established by uncovering information of both direct and indirect methods of causing death. Direct methods of killing, among others, may include shooting, beatings or killing with a grenade.<sup>614</sup> Indirect methods of killing may include:

- Imposing certain conditions of life which caused death, such as imprisoning a large number of people and limiting their access to the necessities of life (e.g., food, medical care, etc.);
- Introducing a deadly virus into a population and preventing medical care;<sup>615</sup>
- Lack of proper housing, clothing or hygiene, excessive work or physical exertion as a result of which one or many died;<sup>616</sup> or
- Reducing the food rations of detainees, resulting in their starvation.<sup>617</sup>

### **3.2.15.2 Element Two: Such Person or Persons were Protected Under One or More of the Geneva Conventions of 1949**

Second, practitioners should seek information showing that the victims are ‘protected persons’ under any of the Geneva Conventions. Persons protected are: (i) civilians in the power of a Party to the IAC or the Occupying Power whose nationality they do not possess; (ii) wounded, sick and shipwrecked members of the armed forces; (iii) prisoners of war (‘POWs’) and other detained persons; (iv) medical and religious personnel; (v) parlementaires (i.e., persons authorised to enter into negotiations with the enemy); (vi) civil defence personnel; and (vii) personnel assigned to the protection of cultural property.<sup>618</sup>

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<sup>611</sup> *Bemba Decision on Confirmation of Charges*, para. 134.

<sup>612</sup> *Bemba Trial Judgment*, para. 88; *Ongwen Trial Judgment*, para. 2698; *Katanga & Chui Decision on the Confirmation of Charges*, para. 422.

<sup>613</sup> *Bemba Trial Judgment*, para. 88; *Katanga Trial Judgment*, para. 768; *Bemba Decision on Confirmation of Charges*, para. 132.

<sup>614</sup> *Prosecutor v. Ntagerura et al.*, ICTR-99-46, Trial Judgment, 25 February 2004, para. 794.

<sup>615</sup> *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 90.

<sup>616</sup> *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 115.

<sup>617</sup> *Prosecutor v. Kaing Guek Eav (alias Duch)*, 001/18-07-2007/ECCC/TC, Trial Judgment, 26 July 2010, para. 437.

<sup>618</sup> ICRC, Protected Persons; First Geneva Convention, Articles 13, 15, 24-27; Second Geneva Convention, Articles 12, 13, 36, 37; Third Geneva Convention, Articles 4, 33; Fourth Geneva Convention, Articles 4, 13 and 20.

### 3.2.15.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status.

Practitioners should also seek information showing that the perpetrator was aware of the factual circumstances that established the protected status of the victims. It is not required for a perpetrator to make a legal determination that a victim was a protected person.<sup>619</sup> It need only be demonstrated that a perpetrator was “aware of the factual circumstances that established the protected status”.<sup>620</sup> For example, that a person appeared to be a child, civilian, doctor, etc.

In relation to civilians, the perpetrator need only know that the victim belonged to an adverse party. Knowledge as to the nationality of the victim or the interpretation of the concept of nationality is not required.<sup>621</sup>

### 3.2.15.4 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence (direct or circumstantial) show that the perpetrator killed (or caused the death of) one or more persons?</b>	<ul style="list-style-type: none"> <li>• Did one or more persons die? If so, how many, when, where and how?</li> <li>• Is there direct evidence that the perpetrator killed the victim (e.g., by an act of violence)?</li> <li>• Is there circumstantial evidence showing that the perpetrator killed the victim and/or other unidentified persons?</li> <li>• What was the location and date of the murder?</li> <li>• What were the circumstances of the crime?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that their residential building was destroyed whilst their family members (civilians) were at home, and that their bodies have not been recovered.</li> <li>• A witness testifying that their family member was present at a location at a time when soldiers shot into a crowd of protesters and has not been seen since.</li> <li>• Photographs of mass graves uncovered in Izium after the city was liberated from Russian occupation.</li> <li>• A video posted on social media depicting a body laying lifeless in the street.</li> <li>• A photograph of a victim’s corpse.</li> <li>• A death certificate of the victim.</li> <li>• Witness testimony describing how the Russian armed forces apprehended several local residents and took the men to their base. Relatives heard screams and gunshots from where the soldiers had detained the victims. The next day, they saw the bodies of six men lying on the street where the incident took place.</li> </ul>

<sup>619</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014, para. 793 fn. 1831.

<sup>620</sup> Rome Statute, Article 8(2)(a)(i); ICC Elements of Crimes, Article 8(2)(a)(i), fn. 33.

<sup>621</sup> ICC Elements of Crimes, Article 8(2)(a)(i), fn. 33.

<p><b>Does the evidence show a causal link between the perpetrator's actions and the victim's death?</b></p>	<ul style="list-style-type: none"> <li>• Did the perpetrator cause the death of one or more of the victims through an act or omission?</li> <li>• What were the means by which the act or omission was committed?</li> <li>• Were the perpetrator's actions a substantial cause of the death?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that unarmed civilians were shot and killed by soldiers.</li> <li>• A forensic autopsy establishing the cause of death of the victim(s) as a fatal blow to the head.</li> <li>• A UN report indicating that the bodies of a number of individuals were found buried next to a building that had been used by the Russian armed forces when they occupied the city.</li> <li>• A witness testifying that POWs who died in detention had been severely tortured and were not provided with food.</li> <li>• A video of soldiers shooting at civilians fleeing across a field.</li> </ul>
<p><b>Does the evidence show that the victim(s) were protected persons under one or more of the Geneva Conventions of 1949, and that the perpetrator was aware of such status?</b></p>	<ul style="list-style-type: none"> <li>• Who was the victim?</li> <li>• Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>◦ Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>◦ Was the victim a POW or a detained person?</li> <li>◦ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>◦ Was the victim medical or religious staff?</li> <li>◦ Was the victim a parlementaire?</li> <li>◦ Was the victim a civil defence personnel?</li> <li>◦ Was the victim assigned to protect cultural property?</li> </ul> </li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the victim was dressed in civilian clothes.</li> <li>• Testimony of the victim that they were assigned to protect cultural property.</li> <li>• Photos and videos depicting civilians being executed.</li> <li>• A UN report indicating that the victims of the summary executions were civilians.</li> <li>• Video depicting the victim, dressed in Priest's clothing, being dragged away from a church by soldiers who subsequently killed him.</li> <li>• A bag with medical supplies, a medical ID and a doctor's coat found on the victim's body.</li> <li>• A witness testifying that the victim was wearing clothing or emblems identifying the victim as a member of the medical profession.</li> </ul>

Table 23: Article 8(2)(a)(i) Cues for Practitioners

### 3.2.16 War Crime of Torture (Article 8(2)(a)(ii)-1, Rome Statute)

Article 8(2)(a)(ii) of the Rome Statute prohibits the war crime of torture and inhuman treatment (see Article 8(2)(a)(ii)-2, below),<sup>622</sup> which consists of the infliction by the perpetrator of severe physical or mental pain or suffering upon one or more persons in an international armed conflict. Torture requires an additional element, namely, that it be perpetrated for the specific purpose of “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind”.<sup>623</sup> This crime is also a grave breach of the Geneva Conventions.<sup>624</sup>

Article 438 of the Criminal Code of Ukraine (‘CCU’) explicitly refers to “cruel treatment of prisoners of war or civilians”, which the war crime of torture would fall under. This crime is also a grave breach of the Geneva Conventions,<sup>625</sup> and is therefore covered by “other violations of rules of the warfare stipulated by international treaties” as set out under Article 438(1). As such, this conduct can be charged as cruel treatment of civilians under Article 438 of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of torture or other inhuman treatment under Article 438.2(9) of the CCU. This provision covers the same contextual elements and specific elements of the crime of torture as a war crime contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>626</sup>

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

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<sup>622</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(a)(ii). The Rome Statute also criminalises torture as a war crime in non-international armed conflicts under Article 8(2)(c)(i) and as a crime against humanity under Article 7(1)(f). The war crime of torture and inhuman treatment is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 2(b); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 4(a); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 3(a); First Geneva Convention, Articles 3, 12; Second Geneva Convention, Articles 3, 12; Third Geneva Convention, Articles 3, 13, 20, 46, Fourth Geneva Convention, Articles 3, 27, 32; Additional Protocol I, Article 75. Additionally, the war crime of torture and inhuman treatment is customary in nature: ICRC, Customary IHL Database, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment.

<sup>623</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(a)(ii)-1.

<sup>624</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

<sup>625</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

<sup>626</sup> ICC Elements of Crimes, Article 8(2)(a)(ii)-1.

3. Such person or persons were protected persons under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### 3.2.16.1 Element One: The Perpetrator Inflicted Severe Physical or Mental Pain or Suffering Upon One or More Persons

The starting point of proving torture is to establish that one or more persons have been subjected to severe pain or suffering. Such pain or suffering can be caused either by an act or omission by the perpetrator.<sup>627</sup> The suffering may be either physical or mental, and it is not necessary to prove that the pain or suffering involved specific physical injury, impairment of a bodily function or death.<sup>628</sup>

The following types of acts have been found to constitute torture before international courts and tribunals:

- **Physical suffering:** beating; burning; mutilation; stabbing; hanging; holding a person in a painful position; electrocution; excessive exposure to heat or cold; being starved; rape and other sexual violence.<sup>629</sup>
- **Mental suffering:** psychological abuse; placing an individual in an extremely stressful situation, such as confinement, isolation or darkness; threatening a person's well-being or that of their family; forcing victims to watch executions of others or bury the bodies of their neighbours and friends; sleep deprivation.<sup>630</sup>

While there is no requirement for the pain or suffering to be visible or permanent,<sup>631</sup> it must meet a certain level of severity which results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life, going beyond temporary unhappiness, embarrassment or humiliation.<sup>632</sup> The severity requirement implies an "important degree of pain and suffering [which] may be met by a single act or by a combination of acts when viewed as a whole".<sup>633</sup>

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<sup>627</sup> *Prosecutor v Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('*Ongwen Trial Judgment*'), para. 2700; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 ('*Delalić*'), para. 468.

<sup>628</sup> *Ongwen Trial Judgment*, para. 2701.

<sup>629</sup> *Ongwen Trial Judgment*, paras 2984-2985, 3027-3028, 3073; *Delalić Trial Judgment*, paras 481-486, 937-943, 963-965, 970-974; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 597.

<sup>630</sup> *Delalić Trial Judgment*, paras 938-942, 958-964, 993-998.

<sup>631</sup> *Ongwen Trial Judgment*, para. 2703; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001 ('*Kvočka et al. Trial Judgment*'), para. 148; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgment, 30 November 2005 ('*Limaj et al. Trial Judgment*'), para. 236.

<sup>632</sup> *Ongwen Trial Judgment*, para. 2701; *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2005, para. 342; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Trial Judgment, 27 September 2007 ('*Mrkšić et al. Trial Judgment*'), para. 514; *Kvočka et al. Trial Judgment*, para. 149; *Limaj Trial Judgment*, para. 236.

<sup>633</sup> *Ongwen Trial Judgment*, para. 2701.



To assess the severity of the pain and suffering, the following should be considered:<sup>634</sup>

- The nature, duration and context of the infliction of pain;
- The premeditation and institutionalisation of the ill-treatment;
- The manner and method used by the perpetrator to cause the pain;
- The victim's age, sex and state of health;
- The position of inferiority of the victim;
- The physical and mental effect of the treatment on the victim; and
- The specific social, cultural and religious background of the victim.

### ***3.2.16.2 Element Two: The Perpetrator Inflicted the Pain or Suffering for Such Purposes as: Obtaining Information or a Confession, Punishment, Intimidation or Coercion or for any Reason Based on Discrimination of Any Kind***

This is a specific intent requirement, which requires practitioners to seek information indicating that the perpetrator inflicted the pain or suffering for a “prohibited purpose”, which includes: obtaining information or a confession; punishment; intimidation; coercion; or for any reason based on discrimination of any kind. The prohibited purpose does not need to be the sole purpose or the main purpose of inflicting the severe pain or suffering.<sup>635</sup>

### ***3.2.16.3 Element Three: Such Person or Persons were Protected under One or More of the Geneva Conventions of 1949***

See Section 3.2.15.2 for a detailed explanation of this element.

### ***3.2.16.4 Element Four: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status***

See Section 3.2.15.3 for a detailed explanation of this element.

### ***3.2.16.5 General Contextual and Mental Elements***

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that a victim suffered severe physical or mental pain or suffering?</b>	<ul style="list-style-type: none"> <li>• Was the pain or suffering the victim suffered physical or mental?</li> <li>• What were the circumstances surrounding the infliction of the pain or suffering?</li> <li>• What method was used to cause the pain or suffering?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that they were forced to watch a sexual attack on a friend which caused them severe mental suffering.</li> <li>• Medical reports describing injuries caused by beating inflicted on the victim.</li> </ul>

<sup>634</sup> *Limaj* Trial Judgment, paras 237; *Mrkšić et al.* Trial Judgment, para. 514; *Prosecutor v. Krnojelac*, IT-97-25, Trial Judgment, 15 March 2002, para. 182; *Prosecutor v. Haridanaj et al.*, IT-04-84 bis-T, Trial Judgment, 29 November 2012, para. 417; *Kvočka et al.* Trial Judgment, para. 143.

<sup>635</sup> *Delalić* Trial Judgment, paras 470-471. *See also*, *Prosecutor v. Krnojelac*, IT-97-25, Trial Judgment, 15 March 2002, para. 184; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001, para. 153.

	<ul style="list-style-type: none"> <li>• How long did the act or omission inflicting the pain or suffering last?</li> <li>• Did the harm suffered by the victim have a negative and long-term effect on their ability to lead a normal life?</li> </ul>	<ul style="list-style-type: none"> <li>• Weapons collected from the crime scene, such as batons, knives and other instruments used to inflict pain on the victim.</li> <li>• Photographs depicting an interrogator's abuse of detainees, such as the conditions of the interrogation room, marks of blood in the room and on the victim's clothing, bruises.</li> <li>• A video of a victim being forced to stand in a stress position and being beaten.</li> <li>• A psychiatric report of the victim detailing the mental effects caused by soldiers who beat them and subjected them to mock executions.</li> <li>• News reports on the system of torture chambers that were set up by the Russian forces in Kherson, where those perceived as being pro-Ukrainian were subjected to physical beatings, electric shocks, waterboarding and being forced to learn and recite pro-Russian propaganda.</li> </ul>
<p><b>Does the evidence show that the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind?</b></p>	<ul style="list-style-type: none"> <li>• What were the circumstances surrounding the incident?</li> <li>• What was the purpose behind the infliction of mental or physical pain or suffering?</li> <li>• Was the victim: interrogated, questioned or forced to make a confession?</li> <li>• Does the nature of the pain or suffering indicate it was used for the purposes of punishment, intimidation, humiliation, etc?</li> <li>• Was the pain or suffering inflicted in an attempt to coerce the victim?</li> <li>• Did the perpetrators display an intent to discriminate against the victim?</li> <li>• Was the victim insulted or humiliated in any way while being tortured?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they were tortured for 3 hours after which they were forced to sign a false confession.</li> <li>• A witness testifying that she was stripped naked, sexually abused and beaten in front of soldiers while they taunted and humiliated her.</li> <li>• Military diaries detailing the interrogation of a victim during which they were tortured in order to obtain information.</li> <li>• Media investigations reporting on abusive interrogations of political opponents which employ beatings, sleep deprivation and waterboarding.</li> <li>• An international organisation report on the intense questioning and beatings that those perceived as being affiliated with the Ukrainian military were subjected to.</li> </ul>
<p><b>Does the evidence show that the victim(s) were</b></p>	<ul style="list-style-type: none"> <li>• Who was the victim?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the victim was dressed in civilian clothes.</li> </ul>

<p><b>protected persons under one or more of the Geneva Conventions of 1949, and that the perpetrator was aware of such status?</b></p>	<ul style="list-style-type: none"> <li>• Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>◦ Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>◦ Was the victim a prisoner of war or a detained person?</li> <li>◦ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>◦ Was the victim medical or religious staff?</li> <li>◦ Was the victim a parlementaire?</li> <li>◦ Was the victim a civil defence personnel?</li> <li>◦ Was the victim assigned to protect cultural property?</li> </ul> </li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• A hospital register containing the names of their staff who had suffered severe injury indicative of torture.</li> <li>• Testimony of the victim that they were assigned to protect cultural property.</li> <li>• Photos and videos depicting civilians being beaten.</li> <li>• A UN report indicating that the victims of torture were civilians.</li> <li>• Video depicting the victim, dressed in Priest's clothing, being dragged away from a church by soldiers (who subsequently tortured him).</li> </ul>
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Table 24: Article 8(2)(a)(ii)-1 Cues for Practitioners

### 3.2.17 War Crime of Inhuman Treatment (Article 8(2)(a)(ii)-2, Rome Statute)

Article 8(2)(a)(ii) of the Rome Statute prohibits the war crime of torture (*see* Article 8(2)(a)(ii)-1, above) and inhuman treatment,<sup>636</sup> which consists of the infliction by the perpetrator of severe

<sup>636</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(a)(ii). The Rome Statute also criminalises inhuman treatment as a war crime in non-international armed conflicts under Article 8(2)(c)(i) and as a crime against humanity under Article 7(1)(f). The war crime of torture and inhuman treatment is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 2(b); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 4(a); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 3(a); First Geneva Convention, Articles 3, 12; Second Geneva Convention, Articles 3, 12; Third Geneva Convention, Articles 3, 13, 20, 46, Fourth Geneva Convention, Articles 3, 27, 32; Additional Protocol I, Article 75. Additionally, the war crime of torture and inhuman treatment is customary in nature: ICRC, Customary IHL Database, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment.

physical or mental pain or suffering upon one or more persons in an international armed conflict. This crime is also a grave breach of the Geneva Conventions.<sup>637</sup>

Article 438(1) of the Criminal Code of Ukraine ('CCU') explicitly refers to "cruel treatment of prisoners of war or civilians", which the war crime of inhuman treatment would fall under. This crime is also a grave breach of the Geneva Conventions,<sup>638</sup> and is therefore also covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). As such, this conduct can be charged as cruel treatment of civilians or torture under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of torture or other inhuman treatment under Article 438.2(9) of the CCU. This provision covers the same contextual elements and specific elements of the war crime of inhuman treatment contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>639</sup>

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were protected persons under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### **3.2.17.1 Element One: The Perpetrator Inflicted Severe Physical or Mental Pain or Suffering Upon One or More Persons**

Firstly, practitioners should seek information showing that the perpetrator inflicted severe physical or mental pain or suffering on one or more persons. 'Inhuman treatment' has been interpreted as acts or omissions against protected persons which are intended to and do cause serious mental or physical suffering or injury or which constitute a serious attack on human dignity.<sup>640</sup>

- **Physical pain or suffering** includes acts such as, *inter alia*: beating, stabbing, hanging, holding a person in a painful position, mutilation, electrocution and excessive exposure to heat or cold.

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<sup>637</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

<sup>638</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

<sup>639</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(a)(ii)-2.

<sup>640</sup> *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998, paras 442 and 543; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 39. See also, O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 335.

- **Mental pain or suffering** can result from acts such as, *inter alia*: placing a person(s) in an extremely stressful situation, such as confinement, isolation or darkness; placing a person(s) in a situation that threatens their well-being or family; forcing a person(s) to watch executions of others or to bury the bodies of their neighbours and friends; and sleep deprivation.<sup>641</sup>

### 3.2.17.2 Element Two: Such Person or Persons were Protected under One or More of the Geneva Conventions of 1949

See Section 3.2.15.2 for a detailed explanation of this element.

### 3.2.17.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status

See Section 3.2.15.3 for a detailed explanation of this element.

### 3.2.17.4 General Contextual and Mental Elements

Finally, practitioners should also seek information showing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the victim suffered severe physical or mental pain or suffering?</b>	<ul style="list-style-type: none"> <li>• Was the pain or suffering the victim suffered physical or mental?</li> <li>• What were the circumstances surrounding the infliction of the pain or suffering?</li> <li>• What method was used to cause the pain or suffering?</li> <li>• How long did the act or omission inflicting the pain or suffering last?</li> <li>• Did the harm suffered by the victim have a negative and long-term effect on their ability to lead a normal life?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims testifying that they were put in solitary confinement cells, designed to hold one person, with up to 18 persons at a time, making it impossible for the detainees to move around the cell, or to sleep lying down.</li> <li>• Contemporary police reports detailing incidents of detainees being severely beaten causing life-changing injuries.</li> <li>• Photos depicting the crowded and unhygienic conditions in a detention centre.</li> <li>• A video of blindfolded victims being forced to stand in stress positions and being beaten with rifle butts and subjected to electric shocks.</li> <li>• Weapons collected from the crime scene, such as batons, knives and other instruments used to inflict pain on the victim.</li> <li>• A UN OHCHR report indicating that civilians were subjected to electrocutions and sleep deprivation.</li> </ul>

<sup>641</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2<sup>nd</sup> edn, OUP 2016), para. 76; ICRC, Customary IHL Database, Rule 90. Torture and Cruel, Inhuman and Degrading Treatment. Note that the ICTY rejected the argument that for an act to amount to torture, it must inflict pain having the same intensity as organ failure, bodily function impairment or death. *See, Prosecutor v. Brđanin*, IT-99-36-A, Appeal Judgment, 3 April 2007, para. 247.

<p><b>Does the evidence show that the victim(s) were protected persons under one or more of the Geneva Conventions of 1949, and that the perpetrator was aware of such status?</b></p>	<ul style="list-style-type: none"> <li>• Who was the victim?</li> <li>• Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>◦ Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>◦ Was the victim a prisoner of war or a detained person?</li> <li>◦ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>◦ Was the victim medical or religious staff?</li> <li>◦ Was the victim a parlementaire?</li> <li>◦ Was the victim a civil defence personnel?</li> <li>◦ Was the victim assigned to protect cultural property?</li> </ul> </li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the victim was dressed in civilian clothes.</li> <li>• A hospital register containing the names of their staff who had suffered severe injury indicative of inhuman treatment.</li> <li>• Testimony of the victim that they were assigned to protect cultural property.</li> <li>• Photos and videos depicting civilians being beaten.</li> <li>• A UN report indicating that the victims of torture were civilians.</li> <li>• Video depicting the victim, dressed in Priest's clothing, being dragged away from a church by soldiers (who subsequently beat him).</li> </ul>
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Table 25: Article 8(2)(a)(ii)-2 Cues for Practitioners

### 3.2.18 War Crime of Wilfully Causing Great Suffering (Article 8(2)(a)(iii), Rome Statute)

Article 8(2)(a)(iii) of the Rome Statute prohibits wilfully causing great suffering to, or serious injury to body or health, of one or more persons during an international armed conflict.<sup>642</sup>

<sup>642</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(a)(iii). The war crime of wilfully causing great suffering is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 2(c); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 4(a); and UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 3(a). The ICTR and SCSL Statutes refer to the crime of wilfully causing great suffering as "[v]iolence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment". See also, *First Geneva Convention*, Article 12; *Second Geneva Convention*, Article 12; *Third Geneva Convention*, Article 13; and *Fourth Geneva Convention*, Article 32. Additionally, the war crime of torture and inhuman treatment is customary in nature: ICRC, Customary IHL Database, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment.



While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to wilfully causing great suffering as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). "[W]ilfully causing great suffering or serious injury to body or health" of a protected person is a grave breach of the Geneva Conventions,<sup>643</sup> and is therefore covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1).

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of causing moderate or severe bodily injury under Article 438.2(10) of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of wilfully causing great suffering contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>644</sup>

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected persons under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### ***3.2.18.1 Element One: The Perpetrator Caused Great Physical or Mental Pain or Suffering to, or Serious Injury to Body or Health of, One or More Persons***

To establish this element, practitioners should seek information showing that one or both of the following types of harm were inflicted upon one or more persons by the perpetrator:<sup>645</sup>

1. Great physical or mental pain or suffering; or
2. Serious injury to body or health.

Examples of conduct that have been found to cause great suffering include: mistreatment, such as stabbing, burning and beating; rape, forced nudity and other forms of sexual abuse; the imposition on detainees of an atmosphere of terror by forcing them to witness the mistreatment of others and their resulting constant fear of being killed or subjected to physical abuse; inhumane living conditions, such as deprivation of adequate food, water, medical care and facilities; and forced displacement.<sup>646</sup>

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<sup>643</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

<sup>644</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(a)(iii).

<sup>645</sup> *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 ('*Delalić* Trial Judgment'), para. 511.

<sup>646</sup> See e.g., *Krstić* Trial Judgment, para. 513; *Naletilić & Martinović* Trial Judgment, paras 350-351; *Delalić* Trial Judgment, paras 1012-1018, 1027-1035, 1086-1111.

### 3.2.18.2 Element Two: Such Person or Persons were Protected under One or More of the Geneva Conventions of 1949

See Section 3.2.15.2 for a detailed explanation of this element.

### 3.2.18.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status

See Section 3.2.15.3 for a detailed explanation of this element.

### 3.2.18.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (see Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons?</b>	<ul style="list-style-type: none"> <li>Was the victim mistreated by the perpetrator(s)? How?</li> <li>In what context did the mistreatment occur?</li> <li>Did the victim suffer any permanent physical or mental injury as a result of the mistreatment?</li> <li>Was the victim incapacitated due to the mistreatment? If so, for how long?</li> <li>What are the long-term effects of the mistreatment on the victim? Will they be able to lead a 'normal and constructive life'?</li> <li>Did the victim have any personal circumstances that exacerbated the effects of the mistreatment?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that he was beaten every day while his hands were tied to a beam (usually with a baseball bat) and that he was forced to drink urine.</li> <li>Medical records demonstrating that the victim was treated for mental and physical suffering that occurred as a result of the mistreatment they endured.</li> <li>The objects or instruments used to inflict great suffering, e.g., a baseball bat that was used to beat the victim.</li> <li>A photo of the victim taken after they were subjected to ill-treatment by the perpetrator depicting the injuries they sustained.</li> <li>An Amnesty International report establishing that the forces commanded by the perpetrator systematically committed sexual violence against women in the course of their military campaign.</li> <li>A UN report indicating that the Russian armed forces detained a priest, undressed him fully, beat him, and ordered him to parade naked for one hour in the streets of his village.</li> </ul>
<b>Does the evidence show that the victim(s) were protected persons under one or more of the Geneva Conventions of</b>	<ul style="list-style-type: none"> <li>Who was the victim?</li> <li>Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>Was the victim a prisoner of war or a detained person?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that the victim was dressed in civilian clothes.</li> <li>A hospital register containing the names of their staff who had suffered severe injury indicative of ill treatment.</li> <li>Testimony of the victim that they were assigned to protect cultural property.</li> <li>Photos and videos depicting civilians being beaten.</li> </ul>

<b>1949, and that the perpetrator was aware of such status?</b>	<ul style="list-style-type: none"> <li>○ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>○ Was the victim medical or religious staff?</li> <li>○ Was the victim a parlementaire?</li> <li>○ Was the victim a civil defence personnel?</li> <li>○ Was the victim assigned to protect cultural property?</li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• A UN report indicating that the victims of torture were civilians.</li> <li>• Video depicting the victim, dressed in Priest's clothing, being dragged away from a church by soldiers (who subsequently beat him).</li> </ul>
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Table 26: Article 8(2)(a)(iii) Cues for Practitioners

### 3.2.19 War Crime of Extensive Destruction and Appropriation of Property (Article 8(2)(a)(iv), Rome Statute)

Article 8(2)(a)(iv) of the Rome Statute prohibits the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.<sup>647</sup>

Article 438(1) of the Criminal Code of Ukraine ('CCU') refers to "use of methods of the warfare prohibited by international instruments", which the war crime of extensive destruction and appropriation of property would fall under. "[E]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" against protected property amounts to a grave breach of the First, Second and Fourth Geneva Conventions.<sup>648</sup> As Ukraine is a party to the First, Second and Fourth Geneva Conventions, this conduct, if committed against property protected by these Conventions, can be charged as extensive destruction and appropriation of property under Article 438(1) of the CCU.

In addition, Draft Bill 7290, will introduce (if, and when, it comes into force) the war crime of "[d]eliberate in connection with an international armed conflict or an armed conflict of a non-international nature, seizure or damage or destruction of property, if it is not justified by military necessity" under Article 438-1

<sup>647</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(a)(iv). The prohibition of destruction or seizure of the enemy property under international humanitarian law is long established. In particular, this misconduct is prohibited by: Lieber Code of 1863, Article 15; Brussels Declaration, Article 13(g); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 ('Hague Regulations'), Article 23(g). The prohibition of destruction or seizure of the enemy property as a war crime is also criminalised in situations of non-international armed conflict under Articles 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute and identified in the following international legal instruments: UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 ('Nuremburg Charter'), Article 6(b); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 2(d); First Geneva Convention, Article 50; Second Geneva Convention, Article 51; Fourth Geneva Convention, Article 147.

<sup>648</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; and Fourth Geneva Convention, Article 147.

of the CCU. This provision integrates the contextual elements and the specific elements of the crime of extensive destruction and appropriation of property as a war crime contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>649</sup>

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### **3.2.19.1 Element One: The Perpetrator Destroyed or Appropriated Certain Property**

To establish this element, practitioners should first identify if property belonging to an ‘adversary’ in the conflict was destroyed or appropriated.<sup>650</sup>

**Destruction of property:** the property in question was partially or completely destroyed by an act or omission.<sup>651</sup> Indeed, “badly damaged property may be akin to partial destruction and thus fall under the definition of destruction”.<sup>652</sup> For example: setting ablaze; demolishing; or otherwise damaging property.<sup>653</sup>

**Appropriation of property:** the control of the property in question was transferred from the owner to the perpetrator.<sup>654</sup> This covers both public and private property and systematic confiscations of property or individual acts of appropriation by soldiers in their self-interest.<sup>655</sup>

### **3.2.19.2 Element Two: The Destruction or Appropriation was not Justified by Military Necessity**

Second, practitioners must establish that the destruction or appropriation was not justified by military necessity. To establish this element, the practitioner should consider whether the

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<sup>649</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(a)(iv).

<sup>650</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 (‘*Katanga Trial Judgment*’), para. 892.

<sup>651</sup> *Katanga Trial Judgment*, para. 891; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 (‘*Katanga & Chui Decision on the Confirmation of Charges*’), para. 310; *Prosecutor v. Mbarushimana* ICC-01/04-01/10, Confirmation of Charges, 16 December 2011, para. 171.

<sup>652</sup> *Katanga Trial Judgment*, para. 891.

<sup>653</sup> *Katanga Trial Judgment*, para. 891.

<sup>654</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016, para. 115.

<sup>655</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019, para. 1152; *Prosecutor v. Prlić et al*, IT-04-74-T, Trial Judgment, para. 129; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001 (‘*Kordić and Čerkez Trial Judgment*’), para. 352.

perpetrator was left with no other option but to carry out the act of destruction or seizure.<sup>656</sup> Military necessity will apply where:

- (i) The property destroyed or seized constituted a military objective before having fallen into the hands of the attacking party; and
- (ii) Having fallen into the hands of the attacking party, its destruction or seizure was still necessary for military reasons.<sup>657</sup>

Military necessity justifies attacks against military objectives, i.e., those affording a definite military advantage by their very nature, including property used directly by the armed forces, such as equipment, structures that provide shelter for the armed forces, depots or communications centres.<sup>658</sup>

In cases in which there is doubt as to the military nature of a damaged/destroyed object that is normally dedicated to civilian purposes – such as places of worship, houses or schools – such objects are presumed *not* to be a military objective.<sup>659</sup>

### ***3.2.19.3 Element Three: The Destruction or Appropriation was Extensive and Carried out Unlawfully and Wantonly***

This element sets out the additional requirement that the destruction or appropriation be extensive, and carried out unlawfully and wantonly. Destruction or appropriation are considered unlawful and wanton when they are not justified by military necessity (*see* Element Two) and are committed deliberately and on a large-scale.<sup>660</sup> Any damage which is disproportionate to the direct and concrete military advantage would qualify as unlawful and wanton.<sup>661</sup> Extensive means the destruction or appropriation of a considerable number of objects or a single object of sufficient value.<sup>662</sup> For instance, a single act, such as the destruction of a hospital, qualifies as extensive.<sup>663</sup>

### ***3.2.19.4 Element Four: Such Property was Protected under One or More of the Geneva Conventions of 1949***

The destroyed or appropriated property must be either: (i) property under the general protection of the Geneva Conventions; or (ii) property situated in occupied territory.<sup>664</sup> Both private and public property is generally protected against destruction or appropriation.<sup>665</sup> For instance, civilian

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<sup>656</sup> *Katanga* Trial Judgment, para. 894.

<sup>657</sup> *Katanga & Chui* Decision on the Confirmation of Charges, para. 318; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 171; *Katanga* Trial Judgment, para. 892.

<sup>658</sup> *Kordić and Čerkez* Trial Judgment, para. 686; *Katanga* Trial Judgment, para. 894.

<sup>659</sup> *Prosecutor v. Prlić*, IT-04-74, Trial Judgment, 29 May 2013 (*Prlić* Trial Judgment), para. 123.

<sup>660</sup> *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Trial Judgment, 15 March 2006, para. 48.

<sup>661</sup> *Prosecutor v. Boškoski et al.*, IT-04-82-T, Trial Judgment, 10 July 2008 (*Boškoski et al.* Trial Judgment), para. 357.

<sup>662</sup> *Boškoski et al.* Trial Judgment, para. 352.

<sup>663</sup> *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000 (*Blaškić* Trial Judgment), para. 157; *Prlić* Trial Judgment, para. 126; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004 (*Brđanin* Trial Judgment), para. 587.

<sup>664</sup> *Prlić* Trial Judgment, paras 122, 129; *Blaškić* Trial Judgment, para. 149; *Kordić & Čerkez* Trial Judgment, para. 341; *Brđanin* Trial Judgment, fns. 1490-1491.

<sup>665</sup> *Prlić* Trial Judgment para. 129.

hospitals and land, sea and air medical transports enjoy general protection, irrespective of the status of the territory in which they are situated.<sup>666</sup>

### **3.2.19.5 Element Five: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status**

See Section 3.2.15.3 for a detailed explanation of this element.

### **3.2.19.6 General Contextual and Mental Elements**

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (see Sections 3.1 and 3.3).

<b>Element</b>	<b>Cues for Practitioners</b>	<b>Examples of Evidence</b>
<b>Does the evidence show that the perpetrator destroyed or appropriated certain property?</b>	<ul style="list-style-type: none"> <li>Was certain property destroyed? If yes, was the destruction partial or complete?</li> <li>Was certain property appropriated?</li> <li>Under what circumstances was the relevant property destroyed or appropriated?</li> <li>What were the consequences of the appropriation of property?</li> <li>Was the property private or public in nature?</li> </ul>	<ul style="list-style-type: none"> <li>A witness describing the adversary's systematic practice of evicting people from their houses and taking their property in the course of military operations.</li> <li>Military Police reports establishing that civilians were expelled from their homes and their apartments were robbed by the perpetrators.</li> <li>Presence of 'splash marks' (i.e., shell impact) on civilian houses.</li> <li>A witness, the headmaster of a school in Hostomel, testifying that the Russian armed forces that had occupied the village had destroyed more than 250 computers, furniture and virtually all of the windows and doors in the school, and had shared photos of the destruction.</li> <li>Video footage during and after shelling confirming that a hospital and number of residential buildings were destroyed.</li> <li>A UN report indicating that, on its visit to Chernihiv, it saw dozens of houses and other buildings that had been destroyed or damaged during the attempt by Russian armed forces to take the city.</li> </ul>
<b>Does the evidence show that the destruction or appropriation was not justified</b>	<ul style="list-style-type: none"> <li>What property was destroyed or appropriated?</li> <li>Where was the relevant property located?</li> </ul>	<ul style="list-style-type: none"> <li>An international mission observer testifying that soldiers broke the display windows of shops and plundered everything they found, including cars, bread, pens and paper, furniture and</li> </ul>

<sup>666</sup> Brđanin Trial Judgment, fn. 1490.



<p><b>by military necessity?</b></p>	<ul style="list-style-type: none"> <li>• What was the purpose/use of the relevant property? How was it used by the victims?</li> <li>• What military advantage did the perpetrator gain by destroying or appropriating the property?</li> <li>• Did the appropriation or destruction of the property advance the war effort of the perpetrator? How?</li> <li>• How crucial was the destroyed or appropriated property for gaining the military advantage in a particular attack/operation?</li> </ul>	<p>household appliances, items not considered to have a direct military use.</p> <ul style="list-style-type: none"> <li>• Operational military reports establishing that there were unrestrained plunders, and the units could not be controlled after the town was liberated, making it impossible to register all the war booty.</li> <li>• Satellite imagery showing the destruction that occurred in a civilian area, with no evident military targets in the area.</li> <li>• Witness testimony of local residents that they saw Russian soldiers who were occupying their town stealing food and alcohol, personal belongings, valuables, computers and household items, such as washing machines and microwaves, from stores and houses.</li> <li>• A train timetable posted showing that the train station was operating for civilian purposes at the time of its destruction.</li> </ul>
<p><b>Does the evidence show that the destruction or appropriation was extensive and carried out unlawfully and wantonly?</b></p>	<ul style="list-style-type: none"> <li>• What was the scale of destruction or appropriation?</li> <li>• How many pieces of property were destroyed or appropriated?</li> <li>• What value did the destroyed or appropriated property have?</li> <li>• How does the scale of the destroyed or appropriated objects/property correlate with the general scale of such objects/property in a given city/town/village?</li> <li>• Was the property civilian in nature or being used for civilian purposes?</li> <li>• Did the perpetrator specifically target the destroyed property, or was it incidental?</li> <li>• What military advantage did the perpetrator gain by destroying the relevant property? Was it proportional?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony of local residents that the Russian occupiers committed widespread looting and, at times, wanton destruction. The residents saw soldiers stealing food and alcohol, personal belongings, valuables, computers and household items, such as washing machines and microwaves, from stores and houses.</li> <li>• Military police reports indicating that the perpetrator was supervising and giving orders for the plunder and appropriation of property belonging to civilian authorities across multiple cities.</li> <li>• Shell impacts indicating the scale of the destruction and the absence of military objectives nearby.</li> <li>• A UN report indicating that on its visit to Chernihiv, the Mission saw large craters and destruction, indicating that at least six munitions struck within an area of about 130 metres, causing significant damage to the surrounding infrastructure.</li> <li>• Satellite imagery showing the destruction of a civilian village.</li> </ul>

		<ul style="list-style-type: none"> <li>European Country Monitoring Mission, ICRC and UN reports establishing that 90% of a municipality's houses, and its religious building, were destroyed.</li> </ul>
<p><b>Does the evidence show that the destroyed property was protected under one or more of the Geneva Conventions?</b></p>	<ul style="list-style-type: none"> <li>What type of property was destroyed or appropriated by the perpetrator?</li> <li>Was the relevant property a hospital or other fixed medical establishment?</li> <li>Was the relevant property land, sea or air medical transport?</li> <li>Was the destroyed or appropriated property situated in an occupied territory?</li> <li>Is there any pattern as to what types of property were targeted by the perpetrator?</li> </ul>	<ul style="list-style-type: none"> <li>A witness explaining the purpose of certain civilian dwellings that were destroyed.</li> <li>The Ukrainian Ministry of Justice announcing that “nearly 4,000 Ukrainian businesses or organisations had lost property” in Russia-occupied Crimea.</li> <li>A witness testifying that the building that was destroyed was a hospital that was clearly marked as such.</li> <li>European Country Monitoring Mission reports establishing that private houses were burned down.</li> <li>News reports indicating that the Mariupol theatre that was shelled by the Russian armed forces had ‘children’ (дети) painted in Russian on the ground outside.</li> <li>Human Rights Watch reports describing the destruction of civilian property by an armed group.</li> </ul>

Table 27: Article 8(2)(a)(iv) Cues for Practitioners

### 3.2.20 War Crime of Compelling Service in Hostile Forces (Article 8(2)(a)(v), Rome Statute)

Article 8(2)(a)(v) of the Rome Statute prohibits compelling service in hostile forces,<sup>667</sup> which will occur when a perpetrator coerces one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power during an international armed conflict.

While Article 438(1) of the Criminal Code of Ukraine (CCU) does not refer to compelling service in hostile forces as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international treaties” as set out under Article 438(1). “[C]ompelling [a prisoner of war or protected person]

<sup>667</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article, 8(2)(a)(v). The Rome Statute also criminalises “compelling the nationals of the hostile party to take part in the operations of war directed against their own country” under Article 8(2)(b)(xv). The war crime of compelling service in hostile forces is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 2(e); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 (‘ECCC Law’), Article 6.

to service in the forces of the hostile Power” is a grave breach of the Third and Fourth Geneva Conventions.<sup>668</sup> As Ukraine is a party to the Third and Fourth Geneva Conventions, this conduct, if committed against persons protected by these Conventions, can be charged as compelling service in the forces of the hostile Power under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of “forcing a prisoner of war or other person under the protection of international humanitarian law to serve in the armed forces of the opposite party to the conflict” under Article 438.1(2) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the war crime of compelling service in hostile forces contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>669</sup>

1. The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person’s own country or forces or otherwise serve in the forces of a hostile power.
2. Such person or persons were protected persons under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### ***3.2.20.1 Element One: The Perpetrator Coerced One or More Persons, by Act or Threat, to Take Part in Military Operations Against that Person’s Own Country or Forces or Otherwise Serve in the Forces of a Hostile Power***

To establish this element, practitioners should seek to identify the act or threat that forced the victim to enlist in the forces of the hostile power.<sup>670</sup> Coercive acts may include abduction, beating or the use of narcotics on protected person(s).<sup>671</sup> Coercion by threat occurs when “such threats being express or implied place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression”.<sup>672</sup>

The war crime of compelling military service will be satisfied where the person or persons is compelled to participate in military operations or work of a military character *against their own country or otherwise serve in the forces of a hostile power*. This also covers situations where the victim is compelled to serve in armed forces allied to the forces of the perpetrator.<sup>673</sup> It should be noted that this element is not limited to situations where the nationals of the occupied territory are forced to

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<sup>668</sup> Third Geneva Convention, Article 130; Fourth Geneva Convention, Article 147.

<sup>669</sup> International Criminal Court (“ICC”), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (“ICC Elements of Crimes”), Article 8(2)(a)(v).

<sup>670</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (“Triffterer & Ambos, *Commentary*”), p. 293.

<sup>671</sup> Case Matrix Network, Means of Proof Digest, Article 8(2)(a)(v).

<sup>672</sup> *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 174.

<sup>673</sup> Triffterer & Ambos, *Commentary*, p. 344.

serve against their own country. It equally applies to situations where they are forced to serve for other purposes. For example, “civilians cannot be requisitioned for such work as ‘the construction of fortifications, trenches, or aerial bases,’ nor can forced labour be performed for strategic or tactical interests of the army”.<sup>674</sup>

### 3.2.20.2 Element Two: Such Person or Persons were Protected under One or More of the Geneva Conventions of 1949

See Section 3.2.15.2 for a detailed explanation of this element.

### 3.2.20.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status

See Section 3.2.15.3 for a detailed explanation of this element.

### 3.2.20.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (see Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power?</b>	<ul style="list-style-type: none"> <li>Did the victim perform military service in the forces of a hostile power?</li> <li>Why did the victim perform military service in the forces of a hostile power?</li> <li>What legal and/or actual consequences did the victim face if they failed to perform compulsory military service?</li> <li>Was there any propaganda and/or pressure aimed at securing voluntary enlistment in the forces of a hostile power?</li> <li>Did the perpetrator coerce the victim to perform military service? If so, how?</li> <li>Was the victim threatened in any way by the perpetrator? If so, how?</li> <li>What kind of work was the victim requested/demanded to perform? Where?</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that he was forced to carry out tasks involving transporting food and ammunition, collecting bodies as well as conducting search operations for the hostile power.</li> <li>Witness testimony about the forced conscription of men by Russian forces that took place in occupied territories, including Crimea, Donetsk, Kherson and Zaporizka.</li> <li>Military orders issued by the perpetrator(s) regarding the need to force civilians in an area under occupation into service in their armed forces.</li> <li>A video documentary compiling testimony, pictures and other evidence of coerced enrolment of civilians into an armed group allied with a hostile power.</li> <li>Satellite imagery of an army barracks where prisoners of war were detained prior to taking part in operations against their own country.</li> <li>UN reports indicating that the armed group forced civilians to commit violent</li> </ul>

<sup>674</sup> *Prosecutor v. Simić et al.*, IT-95-17/1-T, Trial Judgment, 17 October 2003, para. 88 (citing Fourth Geneva Convention, Article 51(2); See also, J. Pictet (ed), *Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) (*‘Commentary on the Fourth Geneva Convention’*), p. 294, and D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (2<sup>nd</sup> edn, OUP 1999), section 564, para. 3, p. 264.

		acts and join their forces in exchange for their life.
<b>Does the evidence show that the victim(s) were protected persons under one or more of the Geneva Conventions of 1949, and that the perpetrator was aware of such status?</b>	<ul style="list-style-type: none"> <li>• Who was the victim?</li> <li>• Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>◦ Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>◦ Was the victim a prisoner of war or a detained person?</li> <li>◦ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>◦ Was the victim medical or religious staff?</li> <li>◦ Was the victim a parlementaire?</li> <li>◦ Was the victim a civil defence personnel?</li> <li>◦ Was the victim assigned to protect cultural property?</li> </ul> </li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the perpetrators transferred detained civilians in trucks to areas where active hostilities were taking place and forced them to perform tasks such as collecting bodies and acting as scouts.</li> <li>• A report by a training commander indicating that prisoners of war were forced to dig trenches.</li> <li>• A video clip depicting rebels forcing civilians to carry heavy loads of looted goods at gunpoint to another location.</li> <li>• UNICEF reports indicating that the armed group forced civil defence personnel to commit violent acts and join their forces in exchange for their life.</li> </ul>

Table 28: Article 8(2)(a)(v) Cues for Practitioners

### 3.2.21 War Crime of Denying a Fair Trial (Article 8(2)(a)(vi), Rome Statute)

Article 8(2)(a)(vi) prohibits the war crime of wilfully depriving a prisoner of war ('POW') or other protected person of the rights of fair and regular trial in an international armed conflict.<sup>675</sup>

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to denying a fair trial as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). Wilfully depriving a prisoner of war or protected person of the rights of fair

<sup>675</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(a)(vi). The Rome Statute also criminalises, in non-international armed conflicts, the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable under Article 8(2)(c)(iv). The war crime of denying a fair trial is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 2(f); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 3(g); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 6.

and regular trial is a grave breach of the Third and Fourth Geneva Conventions,<sup>676</sup> as well as Additional Protocol I.<sup>677</sup> As Ukraine is a party to the Third and Fourth Geneva Conventions and Additional Protocol I, this conduct, if committed against persons protected by the Geneva Conventions, can be charged as wilfully denying a fair trial under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it enters into force) the specific war crime of “deprivation of a person under the protection of international humanitarian law of the right to a fair and proper trial” under Article 438.2(4) of the CCU. This provision covers substantially the same contextual elements and specific elements of the crime of denying a fair trial contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>678</sup>

1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

### ***3.2.21.1 Element One: The Perpetrator Deprived One or More Persons of a Fair and Regular Trial by Denying Judicial Guarantees as Defined, in Particular, in the Third and the Fourth Geneva Conventions of 1949***

The specific fair trial guarantees referenced in this element are set out across numerous provisions of the Third and Fourth Geneva Conventions.<sup>679</sup> These protections can be summarised as follows:<sup>680</sup>

#### ***3.2.21.1.1 The right of an accused to be judged by an independent and impartial court***

Article 84(2) of the Third Geneva Convention protects the right of POWs to be tried before an independent and impartial tribunal.<sup>681</sup> This right will be violated where a POW is tried before a tribunal (be it military or civilian) which fails to meet the minimum standards of independence and impartiality.<sup>682</sup>

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<sup>676</sup> Third Geneva Convention, Article 130; Fourth Geneva Convention, Article 147.

<sup>677</sup> Additional Protocol I, Article 85(4)(e).

<sup>678</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(a)(vi).

<sup>679</sup> See, Third Geneva Convention, Articles 71-75, 99-108; Fourth Geneva Convention, Article 126.

<sup>680</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 344, para. 138.

<sup>681</sup> Third Geneva Convention, Article 48(2). See also, *Prosecutor v. Kaing Guek Eav (alias Duch)*, 001/18-07-2007/ECCC/TC, Trial Judgment, 26 July 2010, paras 458-459.

<sup>682</sup> International Committee of the Red Cross Commentary of 2020 to Geneva Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) (‘ICRC Commentary to Geneva Convention III (2020)’), Article 48, paras 3596-3597.



- ‘**Independence**’ is defined as “a functional attribute which implies that the institution or individual possessing it is not subject to external authority and has complete freedom in decision-making”.<sup>683</sup>
- ‘**Impartiality**’ has two aspects: (i) judges must be free from personal bias or prejudice;<sup>684</sup> and (ii) the Court must be *objectively* impartial, i.e., it must appear to the objective observer to be impartial.<sup>685</sup>

#### 3.2.21.1.2 *The right of an accused to be promptly informed of the offences with which they are charged*

This right is protected under the Third and Fourth Geneva Conventions.<sup>686</sup> According to the Third Geneva Convention, notification must be made as soon as possible, and must include: (i) the POW’s name and rank; (ii) their place of internment or confinement; (iii) specification of the charges, including the applicable legal provisions; and (iv) the Court before which the case is to be adjudicated, including the date and location.<sup>687</sup>

#### 3.2.21.1.3 *The rights and means of defence*

Under the Geneva Conventions, no protected person can be convicted “without having an opportunity to present his defence and the assistance of a qualified advocate or counsel”.<sup>688</sup> If the accused does not choose counsel, the Detaining Power must appoint one on their behalf.<sup>689</sup> POWs are also guaranteed the right to call witnesses, and the services of an interpreter if needed.<sup>690</sup>

#### 3.2.21.1.4 *The principle of individual criminal responsibility*

The principle of individual criminal responsibility provides that, “[n]o protected person may be punished for an offence he or she has not personally committed”.<sup>691</sup> In line with this principle,

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<sup>683</sup> *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007 (‘*Nahimana Appeals Judgment*’), para. 19; ICRC Commentary to Geneva Convention III (2020), para. 3611.

<sup>684</sup> UN Human Rights Committee (‘HRC’), ‘General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial’, CCPR/C/GC/32, 23 August 2007, para. 21; ECHR, *Incal v. Turkey*, Communication No. 22678/93, Judgment, 9 June 1998, para. 65.

<sup>685</sup> HRC, ‘General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial’, CCPR/C/GC/32, 23 August 2007, para. 21; *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Judgment, 21 July 2000, paras 189-191; *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgement, 30 November 2006, paras 37-41; *Prosecutor v. Akayesu*, ICTR-96-4-T, Appeal Judgement, 23 November 2001, paras 203-207; *Nahimana Appeals Judgment*, paras 47-50.

<sup>686</sup> Third Geneva Convention, Article 104; Fourth Geneva Convention, Article 71(2).

<sup>687</sup> Third Geneva Convention, Article 104.

<sup>688</sup> Third Geneva Convention, Articles 99; 105; Fourth Geneva Convention, Article 72. *See also*, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), ETS No.005, Opened for signature 4 November 1950 entry into force 3 September 1953 (‘ECHR’), Article 6(3); International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49) 999 UNTS 171 (‘ICCPR’), Article 14(3)(b). In addition the rule that “No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees” is a norm of customary IHL, ICRC, Customary IHL Database, Rule 100.

<sup>689</sup> ICRC Commentary to Geneva Convention III (2020), para. 4083.

<sup>690</sup> Third Geneva Convention, Article 105; Fourth Geneva Convention, Article 72.

<sup>691</sup> Fourth Geneva Convention, Article 33; Third Geneva Convention, Article 87.

collective punishments are also prohibited,<sup>692</sup> and are considered war crimes under the statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.<sup>693</sup>

#### 3.2.21.1.5 The principle of *nullem crimen sine lege*

According to the principle of *nullem crimen sine lege*, “[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed”.<sup>694</sup> Crucially, a person may be prosecuted for an international crime even if the conduct in question was not criminalised under the domestic law of the Detaining Power at the time of commission.<sup>695</sup> In such a case, the crime must be provided for under international law, meaning treaty law or customary international law.<sup>696</sup> Where the international crime is based in treaty law, that treaty must be binding on both the Detaining Power and the Power on which the POW depended at the time of commission.<sup>697</sup> Customary international law may also be relied upon, provided that the invoked rule is “clear and unambiguous”.<sup>698</sup>

#### 3.2.21.1.6 The principle of *non bis in idem*

Also known as the prohibition against “double jeopardy”, the *non bis in idem* principle means that “[n]o prisoner of war or internee “may be punished more than once for the same act, or on the same charge”.<sup>699</sup> Often the same conduct (or ‘act’) could amount to a number of different international crimes.<sup>700</sup> For instance, where a perpetrator killed another person, this conduct could be prosecuted as the war crime of wilful killing, the crime against humanity of murder, or the crime of genocide committed through the killing of members of the group.<sup>701</sup> Under such circumstances, the principle of *non bis in idem* protects the accused from being subjected to multiple charges, convictions or punishments for the same act.

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<sup>692</sup> Third Geneva Convention, Article 87; ICRC Commentary to Geneva Convention III (2020), paras 3688-3696.

<sup>693</sup> UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 4(b); SCSL Statute, Article 3(b). See also, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Appeals Judgment, 28 May 2008 (‘*Fofana and Kondewa Appeals Judgment*’), pp. 190-191, Count 7; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009, p. 684, Count 2. See also, *Fofana and Kondewa Appeals Judgment*, paras 223-224: “collective punishment is an indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible”

<sup>694</sup> Third Geneva Convention, Article 99; Fourth Geneva Convention, Article 67.

<sup>695</sup> ICRC Commentary to Geneva Convention III (2020), Article 99, para. 3959: “The reference to international law in Article 99(1) makes clear that a prisoner of war may be prosecuted for an international crime even if the conduct in question was not prohibited under the domestic law of the Detaining Power at the time of the act. [...] This clause is not an exception to the principle of legality but rather an extension of that principle to international legal norms, thereby also protecting prisoners of war against the retroactive application of international criminal norms.”

<sup>696</sup> ICRC Commentary to Geneva Convention III (2020), Article 99, para. 3956.

<sup>697</sup> ICRC Commentary to Geneva Convention III (2020), Article 99, para. 3960.

<sup>698</sup> ICRC Commentary to Geneva Convention III (2020), Article 99, para. 3960.

<sup>699</sup> Third Geneva Convention, Article 86; Fourth Geneva Convention, Article 117. See also, ICCPR, Article 14(7).

<sup>700</sup> ICRC Commentary to Geneva Convention III (2020), para. 3650.

<sup>701</sup> Rome Statute, Articles 8(2)(a)(i), 7(1)(a), and 6(a), respectively.

#### 3.2.21.1.7 *The right to be informed of the right to appeal*

Article 106 of the Third Geneva Convention and Article 73 of the Fourth Geneva Convention provide that convicted persons are guaranteed the right of appeal from any sentence, “with a view to the quashing or revising of the sentence or the reopening of the trial”.<sup>702</sup> This right must be communicated to the accused, including all the necessary information to enable appeal proceedings to be launched in a timely manner.<sup>703</sup>

#### 3.2.21.1.8 *Other minimum guarantees provided for under Article 75 of Additional Protocol I*

The inclusion of the words ‘in particular’ in Element One means that the war crime of denying a fair trial can be committed if guarantees other than those found in the Third and Fourth Geneva Conventions are denied.<sup>704</sup>

In particular, Article 75 of Additional Protocol I sets out a number of fundamental judicial guarantees applicable to all who fall into the hands of the enemy and who do not benefit from more favourable treatment under IHL.<sup>705</sup> This includes the following rights which are not mentioned in the Geneva Conventions:

- The presumption of innocence;<sup>706</sup>
- The right of the accused to be present at their trial;<sup>707</sup>
- The right of the accused to not testify against themselves or confess guilt;<sup>708</sup> and
- The right of the accused to have the judgment pronounced publicly.<sup>709</sup>

#### 3.2.21.2 *Element Two: Such Person or Persons were Protected under One or More of the Geneva Conventions of 1949*

See Section 3.2.15.2 for a detailed explanation of this element.

#### 3.2.21.3 *Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status*

See Section 3.2.15.3 for a detailed explanation of this element.

#### 3.2.21.4 *General Contextual and Mental Elements*

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

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<sup>702</sup> Third Geneva Convention, Article 106; Fourth Geneva Convention, Article 73.

<sup>703</sup> ICRC Commentary to Geneva Convention III (2020), para. 4161.

<sup>704</sup> ICC Elements of Crimes, Article 8(2)(a)(vi), Element One; O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 345, para. 139.

<sup>705</sup> Additional Protocol I, Article 75.

<sup>706</sup> Additional Protocol I, Article 75(4)(d).

<sup>707</sup> Additional Protocol I, Article 75(4)(e).

<sup>708</sup> Additional Protocol I, Article 75(4)(f).

<sup>709</sup> Additional Protocol I, Article 75(4)(i).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator deprived one or more persons of fair trial rights?</b>	<ul style="list-style-type: none"> <li>Was the person denied the rights of fair trial? For example: <ul style="list-style-type: none"> <li>Was the accused brought to trial without being informed of the charges brought against them?</li> <li>Was the accused denied access to legal assistance?</li> <li>Was the accused denied the opportunity to call witnesses?</li> <li>Was the accused forced to confess guilt or self-incriminate themselves?</li> <li>Was the accused charged with a crime which was not provided for under the legislation of the Detaining Power at the time of commission?</li> <li>Was the accused denied the opportunity to be present at their trial?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony from the victim describing that they were brought to trial without being offered any legal assistance from qualified counsel.</li> <li>Transcripts from trial proceedings indicating that the victim was denied the opportunity to call a witness.</li> <li>A video recording of the trial showing that the accused (the victim) was not present, without any indication that they had waived their right to be present.</li> <li>A copy of an indictment showing that the victim was accused of a crime which was not provided for under domestic or international law at the time of commission.</li> <li>Victim testimony that they were detained by Russian forces after they occupied their town and were not informed of the reasons for their detention and their detention was never reviewed by a judicial authority.</li> <li>A report from a trial monitor identifying several deprivations of fair trial rights during the victim's court proceedings.</li> </ul>

Table 29: Article 8(2)(a)(vi) Cues for Practitioners

### 3.2.22 War Crime of Unlawful Deportation and Transfer (Article 8(2)(a)(vii)-1, Rome Statute)

Article 8(2)(a)(vii)-1 of the Rome Statute prohibits the war crime of unlawful deportation and transfer,<sup>710</sup> which occurs where a perpetrator deports or transfers one or more persons to another State or to another location in an international armed conflict.<sup>711</sup>

<sup>710</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(a)(vii).

<sup>711</sup> The war crime of unlawful deportation and transfer is also prohibited in the following international legal instruments: UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 ('Nuremburg Charter'), Article 6(b); UN, International Military Tribunal for the Far East Charter (19 January 1946), TIAS 1589 ('Tokyo Charter'), Article 5(b); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 2(g); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 6.

Article 438(1) of the Criminal Code of Ukraine ('CCU') refers to "deportation of civilian population to engage them in forced labour". However, this war crime will only apply when the purpose of the deportation is to engage the civilians in forced labour. Nevertheless, deportation and transfer for any unlawful purpose, not just forced labour, is also covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). Indeed, "unlawful deportation or transfer" of protected persons is considered a grave breach of the Fourth Geneva Convention.<sup>712</sup> As Ukraine is a party to the Fourth Geneva Convention, this conduct, if committed against persons protected by this Convention, can be charged as unlawful deportation or transfer under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of "deportation of the population, i.e., forced and in the absence of grounds provided by international law, relocation (eviction) of one or more persons from the area in which they were legally located, to the territory of another state" under Article 438.2(1) and "forcible transfer of the population, i.e., forced and in the absence of grounds provided by international law, relocation (eviction) of one or more persons from the area in which they were legally located, to another area within one state" under Article 438.2(2) of the CCU. This provision covers the same contextual elements and specific elements of the crime of unlawful deportation and transfer as a war crime contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>713</sup>

1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### ***3.2.22.1 Element One: The Perpetrator Deported or Transferred One or More Persons to Another State or to Another Location***

To satisfy the first element, the evidence must establish that protected persons (*see* Element 2) were deported to another State or transferred to another location. The displacement or transfer must be forcible,<sup>714</sup> which is understood as including not only physical force, but also other means of physical

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<sup>712</sup> Fourth Geneva Convention, Article 147.

<sup>713</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(a)(vii)-1.

<sup>714</sup> Fourth Geneva Convention, Article 49(1): "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupied Power or to that of any other country, occupied or not, are prohibited, regardless of their motive".

or non-physical coercion.<sup>715</sup> This means that the war crime of deportation will not be established where the persons left voluntarily.<sup>716</sup> A mere threat of force, or physical or mental coercion may suffice to fulfil this element, “if the targeted population facing this coercive climate or these threats, has no other choice but to leave its territory”.<sup>717</sup> Military commanders or political leaders cannot consent on behalf of the individual, for example, during population exchange agreements.<sup>718</sup>

In addition to demonstrating some form of force or coercion, the evidence must also show that the deportation/transfer itself was ‘unlawful’.<sup>719</sup> Indeed, not all situations of deportation/transfer of the population are prohibited under international humanitarian law. Practitioners will therefore have to assess whether a particular situation may be justified by one of the lawful exceptions provided for in the Geneva Conventions.

Article 49(2) of the Fourth Geneva Convention provides that “the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand”.<sup>720</sup> If a population transfer is carried out on either of these grounds – security of the population or imperative military reasons – it cannot constitute the crime of deportation or forcible transfer.<sup>721</sup> Forcible deportations or transfers of the population are presumed to be unlawful. Accordingly, the burden will be on the relevant party to prove that the security or imperative military reasons exist.<sup>722</sup>

In cases where a deportation or transfer has been justified for reasons of securing the security of the population or for imperative military reasons, the displaced persons must be returned to their homes as soon as the situation allows.<sup>723</sup> As such, a deportation carried out for lawful purposes may nonetheless become unlawful if the population is not returned as soon as the hostilities in the area have ceased.

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<sup>715</sup> *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2003 (*‘Naletilić & Martinović Trial Judgment’*), para. 519; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001 (*‘Krstić Trial Judgment’*), para. 528; *Prosecutor v. Prlić*, IT-04-74-T, Trial Judgment, 29 May 2013 (*‘Prlić Trial Judgment’*), para. 50.

<sup>716</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (*‘Triffterer & Ambos, Commentary’*), pp. 347-348; J. Pictet (ed), *Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) (*‘Commentary on the Fourth Geneva Convention’*), p. 279.

<sup>717</sup> *Prlić Trial Judgment*, para. 50.

<sup>718</sup> *Naletilić & Martinović Trial Judgment*, paras 522-523.

<sup>719</sup> See Fourth Geneva Convention, Article 147: “unlawful deportation or transfer...” (emphasis added).

<sup>720</sup> Fourth Geneva Convention, Article 49(2); *Commentary on the Fourth Geneva Convention*, p. 280: “If therefore an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge. The same applies when the presence of protected persons in an area hampers military considerations”. See also *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgment, 22 March 2006 (*‘Stakić Appeal Judgment’*), para. 284; *Krstić Trial Judgment*, para. 524; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment, 10 June 2010 (*‘Popović et al. Trial Judgment’*), para. 901; *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Judgment, 12 December 2012, para. 798; *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Judgment, 30 May 2013, (*‘Stanišić and Simatović Trial Judgment’*), para. 994.

<sup>721</sup> *Stakić Appeal Judgment*, para. 284.

<sup>722</sup> *Commentary on the Fourth Geneva Convention*, p. 280.

<sup>723</sup> Fourth Geneva Convention, Article 49(2); *Stanišić and Simatović Trial Judgment*, para. 994; *Krstić Trial Judgment*, para. 524; *Blagojević & Jokić Trial Judgment*, para. 599; *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Judgment, 27 September 2006, para. 725.



These justifications will be discussed, in turn, below.

#### 3.2.22.1.1 Security of the Population

Evacuation is permitted where necessary to ensure the security of the population when the area in which they are located is in danger as a result of “military operations” or “intense bombing”.<sup>724</sup> It is permitted to temporarily transfer a population in order to prevent them from being exposed to grave danger.<sup>725</sup> Displacement of the population, however, is “not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused’s own unlawful activity”.<sup>726</sup>

#### 3.2.22.1.2 Imperative Military Reasons

Evacuation of the population is also lawful under IHL when “imperative military reasons so demand”.<sup>727</sup> An imperative military reason may be the need to clear a combat zone.<sup>728</sup> The ICRC has made clear that this justification should be strictly limited.<sup>729</sup> The ICRC has further specified that “imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group”.<sup>730</sup> When considering whether this justification applies, practitioners should consider whether there was, in fact, a “military or other significant threat to the physical security of the population, and whether the military operation in question was ‘imperative’”.<sup>731</sup>

If the justification of ‘imperative military reasons’ is invoked, practitioners should consider the actual motive of the perpetrators to determine whether the true purpose was to expel the population. If the purpose was to force the population out, this exception would not qualify. In *Krstić*, the ICTY Trial Chamber found that the atmosphere of terror in which the evacuation was conducted proves that it was carried out in furtherance of a well-organised policy whose purpose was to expel the Bosnian Muslim population, rather than to protect the civilians or for imperative military reasons.<sup>732</sup>

#### **3.2.22.2 Element Two: Such Person or Persons were Protected under One or More of the Geneva Conventions of 1949**

See Section 3.2.15.2 for a detailed explanation of this element.

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<sup>724</sup> *Commentary on the Fourth Geneva Convention*, p. 280; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005, (*Blagojević & Jokić* Trial Judgment), para. 598.

<sup>725</sup> *Commentary on the Fourth Geneva Convention* p. 280. See also *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) (*Commentary on the Additional Protocols*), Additional Protocol II, Article 17, para. 4853. Note, Additional Protocol II is only applicable to non-international armed conflicts – it is cited here only to aid interpretation of the ‘security’ justification.

<sup>726</sup> *Stakić* Appeal Judgment, para. 287.

<sup>727</sup> Fourth Geneva Convention, Article 49(2).

<sup>728</sup> ICRC, Customary IHL Database, Rule 129.

<sup>729</sup> *Commentary on the Additional Protocols*, Additional Protocol II, Article 17, para. 4853; *Commentary on the Fourth Geneva Convention*, p. 283.

<sup>730</sup> *Commentary on the Additional Protocols*, Additional Protocol II, Article 17, para. 4854; *Commentary on the Fourth Geneva Convention*, p. 283.

<sup>731</sup> *Blagojević & Jokić* Trial Judgment, para. 598. See also, *Krstić* Trial Judgment, para. 526.

<sup>732</sup> *Krstić* Trial Judgment, para. 527.

### 3.2.22.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status

See Section 3.2.15.3 for a detailed explanation of this element.

### 3.2.22.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator deported or transferred one or more persons?</b>	<ul style="list-style-type: none"> <li>• Were one or more persons displaced to another State or transferred to another location within a State?</li> <li>• What were the circumstances of such displacement (when, where, who, etc.)?</li> <li>• Were the victims expelled by the perpetrator?</li> <li>• Did the perpetrator cause the displacement through physical violence or other coercive acts such as fear of violence, duress, detention, psychological oppression, or abuse of power or taking advantage of a coercive environment?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from multiple residents of a town describing that they were forced to leave following a series of indiscriminate attacks.</li> <li>• A military document signed by the perpetrator stating that all residents should be transferred out of a certain region.</li> <li>• Aerial photographs showing long lines of people leaving a city in the aftermath of an attack.</li> <li>• A report from a humanitarian organisation describing how all local residents were coerced into leaving a city following a series of arbitrary arrests/detentions by members of the Occupation administration.</li> <li>• Witness testimony stating that they were detained in a holding centre before being transferred across a State border.</li> <li>• A report by an international organisation on the forcible transfer of civilians from Mariupol to Russian-occupied areas of Ukraine and Russia. These transfers occurred in a coercive environment due to the involvement of the military, the fact that Mariupol had been under siege and the fact that, where the civilians were willing to leave, they were nevertheless prevented from going to Ukrainian government-held areas.</li> </ul>
<b>Does the evidence show that the displacement was unlawful</b>	<ul style="list-style-type: none"> <li>• Were there any grounds in international law permitting the forcible transfer or deportation of the relevant person(s)?</li> <li>• Were the victims displaced because of security or imperative military reasons? If so, were the relocated persons able to return to their homes</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from members of the deported population describing how members of the armed forces of the adversary forcibly removed them from their homes without providing any justifications.</li> <li>• Aerial photographs of the area from which civilians were deported showing</li> </ul>

	<p>as soon as the crisis was resolved, or hostilities ended?</p> <ul style="list-style-type: none"> <li>• Were the victims displaced because of any other humanitarian reason that was not caused by the actions of the perpetrator?</li> </ul>	<p>that there were no military targets present.</p> <ul style="list-style-type: none"> <li>• A military analysis report indicating that there were no imperative military reasons for the displacement.</li> <li>• A UN report indicating that the displacement was caused by soldiers intimidating the local population, and that there were no security, humanitarian or imperative military reasons.</li> <li>• A report indicating that the ‘evacuation’ of civilians from Mariupol by Russian forces was initiated in response to the siege of the city implemented by the Russian forces themselves.</li> </ul>
<p><b>Does the evidence show that the victim(s) were protected persons under one or more of the Geneva Conventions of 1949, and that the perpetrator was aware of such status?</b></p>	<ul style="list-style-type: none"> <li>• Who was the victim?</li> <li>• Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>○ Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>○ Was the victim a prisoner of war or a detained person?</li> <li>○ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>○ Was the victim medical or religious staff?</li> <li>○ Was the victim a parlementaire?</li> <li>○ Was the victim a civil defence personnel?</li> <li>○ Was the victim assigned to protect cultural property?</li> </ul> </li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from one of the victims stating that they worked as a doctor in the town from which they were removed.</li> <li>• A photograph of POWs being forced onto buses outside the detention centre.</li> <li>• An NGO report stating that all staff of a certain hospital had fled the city following repeated attacks in the area surrounding their place of work.</li> <li>• Official documents of the Occupation administration stating that there were no military personnel stationed in the area from which the victims were deported.</li> <li>• Satellite imagery of a holding centre where civilians were held prior to being transferred.</li> </ul>

Table 30: Article 8(2)(a)(vii)-1 Cues for Practitioners

### 3.2.23 War Crime of Unlawful Confinement (Article 8(2)(a)(vii)-2)

Article 8(2)(a)(vii)-2 of the Rome Statute prohibits unlawful confinement, which will occur when the perpetrator confines or continues to confine one or more persons to a certain location unless such confinement can be considered legal.<sup>733</sup>

While Article 438(1) of the Criminal Code of Ukraine (‘CCU’) does not refer to unlawful confinement as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international treaties” as set out under Article 438(1). “Unlawful confinement of a protected person” is a grave breach of the Fourth Geneva Convention.<sup>734</sup> As Ukraine is a party to the Fourth Geneva Convention, this conduct, if committed against persons protected by this Convention, can be charged as unlawful confinement under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “illegal imprisonment” under Article 438.2(7) of the CCU. Although worded differently from its Rome Statute counterpart, this provision in Draft Bill 7290 should be interpreted to integrate both the contextual elements and the specific elements of the war crime of unlawful confinement contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>735</sup>

1. The perpetrator confined or continued to confine one or more persons to a certain location.
2. Such person/persons were protected persons under one or more of the Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### 3.2.23.1 Element One: The Perpetrator Confined or Continued to Confine One or More Persons to a Certain Location

In order to establish this element, the information must establish that the perpetrator confined or continued to confine, unlawfully, one or more persons to a certain location. Confinement in this context means depriving one or more persons of their liberty, including through detention.<sup>736</sup>

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<sup>733</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(a)(vii)-2. The war crime of unlawful confinement is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 2(g). The prohibition of arbitrary deprivation of liberty is part of customary international law. See, ICRC, Customary IHL Database, Rule 99. Deprivation of Liberty. Unlawful confinement is also prohibited as a crime against humanity (i.e., imprisonment or other severe deprivation of physical liberty) under 7(e) of the Rome Statute.

<sup>734</sup> Fourth Geneva Convention, Article 147.

<sup>735</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(a)(vii)-2.

<sup>736</sup> See e.g., *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 321.

Practitioners should consider:<sup>737</sup>

- In situations of international armed conflict, whether the persons deprived of their liberty are confined due to reasons of *absolute necessity for the security of the detaining Power*; or
- In situations of occupation, whether the persons deprived of their liberty are confined due to *imperative reasons of security*.

The following, among others, are activities that may justify confinement for reasons of security: direct participation in hostilities; espionage; sabotage; and intelligence sharing with the enemy State or enemy nationals.<sup>738</sup> Nevertheless, confinement will only be lawful if the requisite procedural safeguards set out in Articles 43 and 78 of the Fourth Geneva Convention are granted to detainees.<sup>739</sup>

### 3.2.23.2 Element Two: Such Person or Persons were Protected Persons Under One or More of the Geneva Conventions of 1949

See Section 3.2.15.2 for a detailed explanation of this element.

### 3.2.23.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status

See Section 3.2.15.3 for a detailed explanation of this element.

### 3.2.23.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (see Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator confined or continued to confine one or more persons to a certain location?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator confine one or more persons to a certain location? Where and when?</li> <li>• How long did the deprivation of liberty last?</li> <li>• Why was the person or persons confined?</li> <li>• Did the person's activities, knowledge or qualifications, represent a real threat to the perpetrator's (or his State's) present or future security?</li> <li>• Did the perpetrator continue to subject the protected persons to such</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that she was detained by members of the armed forces inside a house for three weeks.</li> <li>• A witness testifying that 40 people, including a pregnant woman, were held in a small apartment by Russian soldiers in Hostomel.</li> <li>• A report by the armed forces noting the arrest and detention of forty civilians.</li> <li>• Aerial photos of detention camps.</li> <li>• A UN Monitoring Mission report indicating that Russian soldiers</li> </ul>

<sup>737</sup> Fourth Geneva Convention, Articles 27, 41, 78. See also, *Prosecutor v. Milorad Krnojelac*, IT-97-25, Trial Judgment, 15 March 2002, para. 123; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 ('*Delalić Trial Judgment*'), paras 576-577; *Prosecutor v. Prlić et al.*, Trial Judgment, IT-04-74-T, 29 May 2013 ('*Prlić et al. Trial Judgment*'), para. 134; ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges' (25 November 2014), p. 3.

<sup>738</sup> *Prlić et al. Trial Judgment*, para. 65; ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges' (25 November 2014), p. 4.

<sup>739</sup> Fourth Geneva Convention, Articles 43 and 78. See also, *Delalić. Trial Judgment*, para. 583; *Delalić Appeal Judgment*, para. 322; *Prlić et al. Trial Judgment*, para. 136; O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 350.

	<p>confinement? Were there any reasonable grounds or evidence to continue the confinement?</p> <ul style="list-style-type: none"> <li>• Did the perpetrator continue to deprive the protected persons of their liberty when such confinement was no longer considered imperative for security reasons?</li> <li>• Did the perpetrator grant the detained persons their procedural rights?</li> </ul>	<p>confined 365 civilians in the basement of a school in Yahidne for 28 days.</p> <ul style="list-style-type: none"> <li>• A military report which showed that the detainees were held in a basement for 40 days with no justification.</li> <li>• A detention centre register showing that the detainees were held without charge.</li> <li>• Satellite imagery showing a system of 21 detention sites in the Donetsk region that the Russian military and Russian-backed separatists use to detain and interrogate civilians and prisoners of war.</li> </ul>
<p><b>Does the evidence show that the victim(s) were protected persons under one or more of the Geneva Conventions of 1949, and that the perpetrator was aware of such status?</b></p>	<ul style="list-style-type: none"> <li>• Who was the victim?</li> <li>• Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>◦ Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>◦ Was the victim a prisoner of war or a detained person?</li> <li>◦ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>◦ Was the victim medical or religious staff?</li> <li>◦ Was the victim a parlementaire?</li> <li>◦ Was the victim a civil defence personnel?</li> <li>◦ Was the victim assigned to protect cultural property?</li> </ul> </li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• Witnesses testifying that civilians were prevented from leaving a village that was controlled by soldiers.</li> <li>• A signed request for the release of 10 prisoners of war who were detained.</li> <li>• A photograph of a medical staff detained in a hospital side building.</li> <li>• Reporting by the Commission on Human Rights that approximately 150 civilians were rounded up and detained in a school.</li> <li>• A military commander report that the combatants were detaining three parlementaires in a disused shelter.</li> </ul>

Table 31: Article 8(2)(a)(vii)-2 Cues for Practitioners

### 3.2.24 War Crime of Taking Hostages (Article 8(2)(a)(viii), Rome Statute)

Article 8(2)(a)(viii) of the Rome Statute prohibits the taking of hostages in an international armed conflict,<sup>740</sup> which will occur when detained persons are threatened with death, injury or the

<sup>740</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(a)(viii). The prohibition of the taking of hostages as a war crime is also criminalised in situations of non-international armed conflict under Article 8(2)(c)(iii). Taking hostages is also prohibited under the



continuation of their detention in order to compel a third party to do or to abstain from doing something as a condition of the release of that person.<sup>741</sup>

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to taking of hostages as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). "[T]aking of hostages" is a grave breach of the Fourth Geneva Convention.<sup>742</sup> As Ukraine is a party to the Fourth Geneva Convention, this conduct, if committed against persons protected by this Convention, can be charged as the taking of hostages under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of taking or holding a person hostage under Article 438.2(6) of the CCU. This provision covers the same contextual elements and specific elements of the war crime of taking hostages contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>743</sup>

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were protected persons under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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following international legal instruments: Fourth Geneva Convention, Article 34; Additional Protocol I, Article 75(2)(c); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 2(h); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 4(c); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 3(c); Nuremberg Charter, Article 6(b). Under IHL, the prohibition of taking of hostages is seen as customary international law applicable both in international and non-international armed conflicts: ICRC, Customary IHL Database, Rule 96. Hostage-Taking.

<sup>741</sup> International Convention against the Taking of Hostages (adopted by the General Assembly of the United Nations on 17 December 1979, entry into force 3 June 1983) 1316 UNTS 205, Article 1. See also, *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgment, 29 July 2004 ('Blaškić Appeal Judgment'), para. 639; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 ('Karadžić Trial Judgment'), para. 468.

<sup>742</sup> Fourth Geneva Convention, Article 147.

<sup>743</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(a)(viii).

### ***3.2.24.1 Element One: The Perpetrator Seized, Detained or Otherwise Held Hostage One or More Persons***

To establish this element, practitioners should seek information showing that the perpetrator seized, detained, or otherwise held hostage one or more persons. Essentially, this means that the perpetrator must have deprived the victim of their liberty.<sup>744</sup>

### ***3.2.24.2 Element Two: The Perpetrator Threatened to Kill, Injure or Continue to Detain such Person or Persons***

The information also needs to establish that the perpetrator threatened detainees with death, injury or continued detention.<sup>745</sup> The threat posed to the detainees must be unlawful.<sup>746</sup> Threats to kill or injure detainees are, in and of themselves, unlawful. However, some threats to continue a person's detention may be lawful. For instance, if someone "who is lawfully detained and whose release is not legally required is threatened with continued detention as part of a negotiation for a prisoner exchange or other negotiations, this would not amount to hostage-taking".<sup>747</sup> If, on the other hand, the detainee is threatened with continued detention without any legal justification, i.e., their release was required by law, then such threat would be unlawful.<sup>748</sup>

### ***3.2.24.3 Element Three: The Perpetrator Intended to Compel a State, an International Organisation, a Natural or Legal Person or a Group of Persons to Act or Refrain from Acting as an Explicit or Implicit Condition for the Safety or the Release of Such Person or Persons***

This is a specific intent requirement, which requires practitioners to establish that, in addition to detaining and threatening one or more persons, the perpetrator intended to compel a concession or to gain an advantage.<sup>749</sup> Examples of concessions or advantages a perpetrator may seek include preventing the opposing party or an international organisation from launching an attack or to obtain favourable provisions in a cease-fire agreement.<sup>750</sup> While the communication of the threat to a third party is not required, it would be indicative of the intention of the perpetrator to compel that third party.<sup>751</sup>

### ***3.2.24.4 Element Four: Such Person or Persons were Protected under One or More of the Geneva Conventions of 1949***

See Section 3.2.15.2 for a detailed explanation of this element.

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<sup>744</sup> *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001 ('Kordić & Čerkez Trial Judgment'), para. 311 (citing J. Pictet (ed), *Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War* (ICRC 1958), pp. 600-601).

<sup>745</sup> *Blaškić Appeal Judgment*, para. 639.

<sup>746</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, *Commentary*'), p. 353.

<sup>747</sup> Triffterer & Ambos, *Commentary*, p. 353.

<sup>748</sup> Triffterer & Ambos, *Commentary*, p. 353.

<sup>749</sup> *Kordić & Čerkez Trial Judgment*, paras 309, 313.

<sup>750</sup> See e.g., *Kordić & Čerkez Trial Judgment*, paras 784, 788; *Karadžić Trial Judgment*, para. 5872; *Prosecutor v. Mladić*, IT-09-92-T, Trial Judgment, 22 November 2017, para. 2232.

<sup>751</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009, para. 598.

### 3.2.24.5 Element Five: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status

See Section 3.2.15.3 for a detailed explanation of this element.

### 3.2.24.6 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator seized, detained or otherwise held hostage one or more persons?</b>	<ul style="list-style-type: none"> <li>Did the perpetrator seize or detain one or more persons?</li> <li>What were the circumstances of the initial detention of the victim?</li> <li>Were there any lawful grounds to detain the victim? If so, what were these grounds?</li> <li>If the victim was initially detained on lawful grounds, did the perpetrator subsequently do anything that rendered the detention unlawful?</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that he was held hostage by Russian forces for 90-days during which time he was beaten and heard other detainees being beaten.</li> <li>An order issued by the perpetrator ordering the disarmament and detention of a number of civilians in response to a bombing on its territory.</li> <li>A video on a local TV station showing a person who had been taken hostage by the perpetrator with their hands tied with rope.</li> <li>A UN situation report indicating that nine members of a UN team were told by the perpetrators that they were not permitted to leave their accommodation.</li> </ul>
<b>Does the evidence show that the perpetrator threatened to kill, injure or continue to detain such person or persons?</b>	<ul style="list-style-type: none"> <li>Did the perpetrator threaten to kill or injure one or more detained persons?</li> <li>Did the perpetrator threaten to continue to detain one or more persons?</li> <li>Was there any legal justification for the perpetrator to continue to detain the victim?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that the perpetrator indicated that if there were any more air strikes from the enemy, one of the detainees would be shot, and if there was an air strike on the radar station, all the remaining detainees would be executed.</li> <li>Negotiation minutes indicating that the perpetrator threatened to harm the hostages.</li> <li>A video interview by one of the perpetrators threatening that the survival of the hostages depended on the enemy's actions.</li> <li>A news report indicating that the perpetrator said three hostages would be killed if air strikes continued.</li> </ul>
<b>Does the evidence show that the perpetrator intended to compel a State, an international organisation, a</b>	<ul style="list-style-type: none"> <li>Why did the perpetrator threaten to kill, injure or continue the detention of the hostages?</li> <li>What did the perpetrator request in exchange for the release of the detained persons?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that he was told by the perpetrator that he must comply with their orders and that he was held captive in order to force the adversary to cease their airstrikes.</li> <li>A ceasefire agreement specifying that the perpetrators agreed to release the</li> </ul>

<p><b>natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons?</b></p>	<ul style="list-style-type: none"> <li>• Did the perpetrator communicate the request to a third party?</li> <li>• Who did the perpetrator make the request to?</li> <li>• Did the perpetrator use the hostages as a bargaining chip during negotiations with the adversary?</li> <li>• Would the perpetrator have gained any advantage if their request was complied with?</li> </ul>	<p>hostages in exchange for concessions from the other party.</p> <ul style="list-style-type: none"> <li>• A victim testifying that the was held hostage by Russian forces for 90-days and that he was only released following months of negotiation between his father, a local Ukrainian official, and Russian soldiers who wanted to exchange the victim for an individual of interest to the Russian military.</li> <li>• A video depicting the moments when the perpetrators told the hostages that they would be killed if their adversary did not comply with their requests.</li> <li>• A UN report indicating that the perpetrator forced a hostage to make a statement to local journalists denouncing the airstrikes that were being conducted by the hostage's State against the perpetrator's armed forces and indicating that if they did not stop, he and the other hostages would be killed.</li> </ul>
<p><b>Does the evidence show that the victim(s) were protected persons under one or more of the Geneva Conventions of 1949, and that the perpetrator was aware of such status?</b></p>	<ul style="list-style-type: none"> <li>• Who was the victim?</li> <li>• Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>◦ Was the victim a sick, wounded or shipwrecked member of the armed forces who ceased taking part in hostilities?</li> <li>◦ Was the victim a prisoner of war or a detained person?</li> <li>◦ Was the victim a civilian who found themselves in the hands of a foreign power due to conflict or occupation?</li> <li>◦ Was the victim medical or religious staff?</li> <li>◦ Was the victim a parlementaire?</li> <li>◦ Was the victim a civil defence personnel?</li> <li>◦ Was the victim assigned to protect cultural property?</li> </ul> </li> <li>• Is there anything to indicate that the perpetrator knew that the victim was a protected person?</li> <li>• Do the surrounding circumstances indicate the perpetrator would have known that the victim was a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the hostages were dressed in civilian clothes.</li> <li>• A hospital register containing the names of their staff who had been held hostage.</li> <li>• Testimony of the hostage that they were assigned to protect cultural property.</li> <li>• Photos and videos depicting civilians being held hostage.</li> <li>• A UN report indicating that the hostages were civilians.</li> <li>• Video depicting the hostage dressed in Priest's clothing.</li> </ul>

Table 32: Article 8(2)(a)(viii) Cues for Practitioners

### 3.2.25 War Crime of Attacking Civilians (Article 8(2)(b)(i), Rome Statute)

Article 8(2)(b)(i) of the Rome Statute prohibits the war crime of attacking civilians,<sup>752</sup> which will occur when the civilian population or civilians not taking direct part in hostilities are intentionally targeted during attacks in an international armed conflict.

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to attacking civilians as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). This conduct is prohibited by Article 51(2) of Additional Protocol I, which states that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack." As Ukraine is a party to Additional Protocol I, this conduct can therefore be charged as making civilians the object of attack under Article 438(1) of the CCU.

In addition, Article 438-2.2(6) of Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of "attacks on the civilian population or individual civilians who are not directly involved in hostilities". This provision covers substantively the same contextual elements and specific elements of the war crime of intentionally directing attacks against civilian objects contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>753</sup>

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### 3.2.25.1 Element One: The Perpetrator Directed an Attack

To satisfy this element, practitioners must establish:

1. That there was an 'attack'; and
2. The attack was directed by the perpetrator(s) in question.

An 'attack' is defined as "acts of violence against the adversary, whether in offence or in defence".<sup>754</sup> This element is fulfilled when the attack is launched and does not require proof of death, injury or

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<sup>752</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(i). The war crime of attacking civilians is also prohibited in non-international armed conflicts under Article 8(2)(e)(i) of the Rome Statute.

<sup>753</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(i).

<sup>754</sup> Additional Protocol I, Article 49(1); *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021, para. 2758; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014, ('Katanga Trial Judgment'), para. 799.

any other result.<sup>755</sup> Examples of an attack would include artillery shelling, the firing of a missile or the laying of mines. This may also include cyber-attacks through viruses or malware which may result in physical damage to persons or objects,<sup>756</sup> or the opening of a floodgate of a dam, which leads to deaths and damage in the flooded areas, notwithstanding the fact that neither of these acts include the use of armed force.<sup>757</sup> Non-physical forms of psychological, political or economic warfare such as disseminating propaganda or embargoes, on the other hand, do not fall under the definition of an ‘attack’.<sup>758</sup>

Once the existence of an attack is established, practitioners should seek information showing that the perpetrator(s) carried out or directed the attack. This means selecting the intended target and deciding on the attack.<sup>759</sup> The task of establishing *who* directed the attack can be challenging. Practitioners should bear in mind that responsibility will often be shared between individuals on the ground who carry out the attack and other superior and high-level officials.<sup>760</sup>

When establishing which individuals, military unit or paramilitary group carried out an attack against civilians, practitioners should interview victims/witnesses who may be able to recall valuable details about their attackers.<sup>761</sup> These details might include the uniforms or emblems the attackers were wearing,<sup>762</sup> their language/accents<sup>763</sup> or their ethnicity.<sup>764</sup> Military logistical records might reveal which military units carried out a particular operation in which civilians were targeted.<sup>765</sup> Once the organisation responsible for conducting the attack on the ground has been established, practitioners should review the organisations *de jure* chain of command/structural hierarchy in order to determine any mid- to high-level perpetrators (see Section 3.4).<sup>766</sup>

### **3.2.25.2 Element Two: The Object of the Attack was a Civilian Population as Such or Individual Civilians not Taking Direct Part in Hostilities**

For an in-depth discussion of the terms ‘civilian’ and ‘civilian population’ for the purposes of establishing this element, see Section 2.1.3.1.

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<sup>755</sup> *Katanga Trial Judgment*, para. 799; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (‘*Ntaganda Trial Judgment*’), para. 904.

<sup>756</sup> Triffterer & Ambos, *Commentary*, p. 355.

<sup>757</sup> Triffterer & Ambos, *Commentary*, p. 355.

<sup>758</sup> Triffterer & Ambos, *Commentary*, p. 355.

<sup>759</sup> *Ntaganda Trial Judgment*, para. 744.

<sup>760</sup> See Section 3.5.3.

<sup>761</sup> IICI Investigators Manual, p. 105.

<sup>762</sup> *Katanga Trial Judgment*, para. 732.

<sup>763</sup> *Katanga Trial Judgment*, para. 735.

<sup>764</sup> *Katanga Trial Judgment*, paras 842-849.

<sup>765</sup> IICI Investigators Manual, p. 105. See also, *Tagayeva and others v. Russia*, Application No. 26562/07, Judgment, 13 April 2017, paras 588-589, where the European Court of Human Rights was able to link the lethal use of force by State agents to civilian deaths. In operative part, the Court held that “[i]rrespective of whether the indiscriminate weapons such as a tank cannon, grenade launchers and flame-throwers had been used before or after 6 p.m. on 3 September, it remains unexplained how the agents employing them were able to verify the absence of hostages in the premises under attack”, and that “the evidence supports a *prima facie* complaint that the State agents used indiscriminate weapons upon the building while the terrorists and hostages were intermingled”.

<sup>766</sup> IICI Manual pp.107-110; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, 5 December 2003, paras 733-736. See also Section 3.5.3.



This element will be satisfied where there is information that the perpetrator directly targeted civilians

This element will also be fulfilled if the perpetrator launched an attack with two distinct aims: (i) to target a military objective; and (ii) to simultaneously target the civilian population or individual civilians not taking direct part in hostilities who reside in the vicinity.<sup>767</sup> Consequently, this crime can still be established even if the military operation also targeted a military objective.<sup>768</sup> It is important, however, to establish that the primary object of the attack was the civilian population or individual civilians.<sup>769</sup> On the other hand, situations where the attack targets a military objective and the attackers are aware this will cause incidental loss of life or injury to civilians are covered by Article 8(2)(b)(iv), discussed below.<sup>770</sup>

Additionally, indiscriminate attacks may qualify as intentional attacks against the civilian population or individual civilians, especially where the damage caused to civilians is so great that it appears that the perpetrator meant to target civilians.<sup>771</sup> For instance, if the perpetrator was targeting a legitimate military objective but used weaponry that has indiscriminate effects, then it may be inferred that the attack was directed at the civilian population or individual civilians.<sup>772</sup>

### **3.2.25.3 Element Three: The Perpetrator Intended the Civilian Population as Such or Individual Civilians not Taking Direct Part in Hostilities to be the Object of the Attack**

This is a specific mental element that requires practitioners to seek information showing that the perpetrator meant to engage in conduct that targeted the civilian population as such or individual civilians not taking direct part in hostilities.<sup>773</sup> Practitioners should look to the surrounding circumstances to demonstrate this element, including the means and methods used during the attack, the number and status of the victims, the discriminatory nature of the attack or, as the case may be, the nature of the act constituting the attack.<sup>774</sup>

### **3.2.25.4 General Contextual and Mental Elements**

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that there was an attack, and that the perpetrator</b>	<ul style="list-style-type: none"> <li>When and where did the act in question take place?</li> <li>What was the nature of the act in question?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that there was an attack on a residential building whilst their family members were at home, and that their bodies have not been recovered.</li> </ul>

<sup>767</sup> *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 273; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 142.

<sup>768</sup> *Katanga* Trial Judgment, para. 801.

<sup>769</sup> *Katanga* Trial Judgment, para. 801.

<sup>770</sup> *Katanga* Trial Judgment, para. 801.

<sup>771</sup> *Katanga* Trial Judgment, para. 802; *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgment, 30 November 2006, para. 132.

<sup>772</sup> *Katanga* Trial Judgment, para. 802.

<sup>773</sup> *Katanga* Trial Judgment, para. 806.

<sup>774</sup> *Katanga* Trial Judgment, para. 807.

<p><b>directed the attack?</b></p>	<ul style="list-style-type: none"> <li>• Was the act in question violent in nature?</li> <li>• Did the act use any form of violence or physical force?</li> <li>• Did any civilian casualties or injuries result from the act? Did the perpetrator direct the attack?</li> <li>• What weapons, methods or plan was used to carry out the attack?</li> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• An official investigation report that found that shots had been fired at the street in a residential neighbourhood and identified trenches that could have been used as the source of the fire.</li> <li>• Photographs of the incident site.</li> <li>• Witness testimony that they saw Russian soldiers in a military convoy on the highway open fire at four civilians who were attempting to flee through the fields.</li> <li>• Forensic ballistics evidence providing information on the weapons that were used in the attack and the direction of firing.</li> </ul>
<p><b>Does the evidence show that the civilians were the primary target?</b></p>	<ul style="list-style-type: none"> <li>• Who were the primary targets of the attack? What were they doing at the time of the attack?</li> <li>• Were the targets of the attack members of any armed forces?</li> <li>• Were there any combatants among the targeted group of civilians? How many? And what were they doing at the time of the attack?</li> <li>• Did the victims transport weapons in proximity to combat operations?</li> <li>• Was the extent of damage caused to civilians to such an extent that it can be inferred they were the primary object of the attack?</li> <li>• Does the evidence show that the civilians who were attacked were not directly participating in hostilities?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that unarmed civilians were shot and killed by soldiers.</li> <li>• Photographs demonstrating that a mortar attack killed a woman and wounded other civilians.</li> <li>• A report indicating that shelling had resulted in a significant number of civilian casualties in recent months.</li> <li>• A witness testifying that, during the attack, the civilians were not engaging in civilian activity.</li> <li>• Photographs depicting the aftermath of an attack in which the victims are dressed in civilian clothes.</li> <li>• A UN report describing an incident where civilians dressed in civilian clothes came across Russian military convoys and that the soldiers within shot the civilians using assault rifles or vehicle-mounted weapons.</li> </ul>
<p><b>Does the evidence show that the attack was intentionally directed at civilians?</b></p>	<ul style="list-style-type: none"> <li>• What are the indications of the fact that the perpetrator intended the civilian population or individual civilians to be the object of the attack?</li> <li>• What means and methods were used during the attack? Was the attack discriminatory in nature?</li> <li>• Did the perpetrator take any precautionary measures in ensuring that civilians were not present within the area attacked?</li> <li>• How many civilians were killed as a result of the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the perpetrators fired upon fleeing civilians, including women and children.</li> <li>• A report concluding that areas under attack contained no military positions.</li> <li>• Satellite imagery of the village in which the attack took place demonstrating that there were no military objectives nearby.</li> <li>• Official military documents containing orders to launch an attack on a town inhabited by civilians.</li> </ul>

Table 33: Article 8(2)(b)(i) Cues for Practitioners

### **3.2.26 War Crime of Intentionally Directing Attacks against Civilian Objects (Article 8(2)(b)(ii), Rome Statute)**

Article 8(2)(b)(ii) of the Rome Statute prohibits “[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives” in the context of an international armed conflict.<sup>775</sup>

While Article 438(1) of the Criminal Code of Ukraine (‘CCU’) does not refer to attacking civilian objects as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international treaties” as set out under Article 438(1). This conduct is prohibited by Article 52(1) of Additional Protocol I, which states that “[c]ivilian objects shall not be the object of attack or of reprisals.” As Ukraine is a party to Additional Protocol I, this conduct can therefore be charged as making civilian objects the object of attack under Article 438(1) of the CCU.

In addition, Article 438-2.2(5) of Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “attacks on the civilian population or individual civilians who are not directly involved in hostilities”. This provision covers substantively the same contextual elements and specific elements of the war crime of intentionally directing attacks against civilian objects contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>776</sup>

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### ***3.2.26.1 Element One: The Perpetrator Directed an Attack***

See Section 3.2.25.1 for a detailed explanation of this element.

#### ***3.2.26.2 Element Two: The Object of the Attack was Civilian Objects, that is, Objects which are not Military Objectives***

Second, practitioners should seek information showing that the attacked object was civilian in nature.<sup>777</sup> For an in-depth discussion of what constitutes a ‘civilian object’ according to this element, and how such objects can be distinguished from ‘military objectives’, see Section 2.1.3.1.

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<sup>775</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(ii).

<sup>776</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(ii).

<sup>777</sup> ICC Elements of Crimes, Article 8(2)(b)(ii).

To satisfy this element, the information must demonstrate that the civilian object was the primary target of the attack.<sup>778</sup> On the other hand, situations where the attack targets a military objective and the attackers are aware this will cause incidental damage to civilian objects are covered by Article 8(2)(b)(iv), below.<sup>779</sup>

### 3.2.26.3 Element Three: The Perpetrator Intended such Civilian Objects to be the Object of the Attack

Finally, practitioners should seek information showing that the perpetrator intended the civilian objects to be the object of the attack. Intent can be established in two circumstances:

- (i) Where the perpetrator “purposefully wills or desires to attain the prohibited result”.<sup>780</sup> This requires it to be demonstrated that the perpetrator voluntarily acted to achieve the desired result.<sup>781</sup>
- (ii) Where the perpetrator is aware that the consequence (i.e., the targeting of civilian objects) will occur in the ordinary course of events.<sup>782</sup> Whilst it is not required to establish ‘absolute certainty’, the information gathered should demonstrate ‘virtual certainty’ that the consequence in question would occur due to the conduct of the perpetrator.<sup>783</sup>

Intent can be inferred from various factors, including the nature of the attack, the specific conduct used by the perpetrator to carry out the attack and the type of weapon(s) used in the attack.<sup>784</sup>

### 3.2.26.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (see Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that an attack took place and that the perpetrator directed the attack?</b>	<ul style="list-style-type: none"> <li>Did an act of violence take place?</li> <li>Did an attack take place, whether it was offensive or defensive?</li> <li>Did the perpetrator carry out or direct the attack?</li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony describing that an apartment building was hit by missiles.</li> <li>Official military documents containing orders to launch an attack.</li> <li>Videos shared online of buildings being shelled by soldiers.</li> <li>A photograph depicting a destroyed bridge in Kyiv.</li> </ul>

<sup>778</sup> *Katanga Trial Judgment*, para. 802.

<sup>779</sup> *Katanga Trial Judgment*, para. 801; Rome Statute, Article 8(2)(b)(iv) (“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”).

<sup>780</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Confirmation of Charges, 15 June 2009 (“*Bemba Decision on the Confirmation of Charges*”), para. 358.

<sup>781</sup> *Katanga Trial Judgment*, paras 774, 781.

<sup>782</sup> Rome Statute, Article 30(2)(b); *Bemba Decision on the Confirmation of Charges*, para. 359.

<sup>783</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021, para. 2695; *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Appeal Judgment, 1 December 2014, paras 447-450; *Katanga Trial Judgment*, para. 776. See also, *Bemba Decision on the Confirmation of Charges*, paras 352-369.

<sup>784</sup> See e.g., *Katanga Trial Judgment*, paras 806, 807; *Prosecutor v. Martić*, IT-95-11-R61, Decision, 8 March 1996, paras 23-31.

		<ul style="list-style-type: none"> <li>• Forensic evidence establishing that a railway bridge was blown up by a mine.</li> <li>• A report indicating that a town was bombarded with missile strikes which damaged or destroyed dozens of residential buildings and vital civilian infrastructure, including a number of energy facilities.</li> </ul>
<b>Does the evidence show that the targeted object(s) was not a military objective?</b>	<ul style="list-style-type: none"> <li>• Did the targeted object make an effective contribution to military action by its very nature (e.g., a military headquarters, or weapons storage)?</li> <li>• Did the targeted object make an effective contribution to military action in another way (i.e., by virtue of its location, purpose or use)?</li> <li>• Did the destruction of the targeted object offer the attacker a definite, concrete military advantage (e.g., gaining ground or weakening enemy forces)?</li> <li>• Was the civilian object the primary target of the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how a targeted building was used exclusively for civilian purposes (i.e., a school or hospital).</li> <li>• Documentary evidence of the destroyed school's register.</li> <li>• Photographs depicting the attacked apartment block.</li> <li>• Satellite imagery showing that no military objectives were present in the vicinity of the destroyed apartment building.</li> <li>• A UN report documenting the destruction of three hospitals in Chernihiv.</li> </ul>
<b>Does the evidence show that the perpetrator intended to target the civilian object?</b>	<ul style="list-style-type: none"> <li>• Does the conduct of the perpetrator indicate that they intended the civilian object to be the object of the attack?</li> <li>• Does the method(s) used during the attack indicate that the perpetrator intended the civilian object to be the object of the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how members of the armed forces purposefully placed mines or explosives on the targeted object which was used as an apartment building.</li> <li>• Photographs showing that no military objectives were present in the surrounding area.</li> <li>• Video depicting the shelling of a school, which demonstrates that the school was clearly identified as such.</li> <li>• Forensic ballistics evidence demonstrating that high-precision weaponry was used in the attack.</li> </ul>

Table 34: Article 8(2)(b)(ii) Cues for Practitioners

### **3.2.27 War Crime of Attacking Personnel, Installations, Material, Units or Vehicles Involved in Humanitarian Assistance (Article 8(2)(b)(iii), Rome Statute)**

Article 8(2)(b)(iii) of the Rome Statute prohibits “intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the

protection given to civilians or civilian objects under the international law of armed conflict” in an IAC.<sup>785</sup>

While Article 438(1) of the Criminal Code of Ukraine (“CCU”) does not refer to intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international treaties” as set out under Article 438(1). This conduct amounts to a serious violation of Additional Protocol I, Article 70(4), which provides that “[t]he Parties to the conflict shall protect relief consignments and facilitate their rapid distribution”, and Article 71(2), which states that “[personnel participating in relief actions] shall be respected and protected”.<sup>786</sup> In relation to occupied territory, this conduct also amounts to a serious violation of Article 59 of the Fourth Geneva Convention, which provides that “[a]ll Contracting Parties shall permit the free passage of [humanitarian relief] consignments and shall guarantee their protection.”<sup>787</sup> As Ukraine is a party to Additional Protocol I and the Fourth Geneva Convention, this conduct can be charged as attacking personnel, installations, material, units or vehicles involved in humanitarian relief actions under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “[striking] personnel, facilities, materials, equipment, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations, as long as they have the right to protection enjoyed by civilians or civilian objects in accordance with the provisions of international law” under Article 438-4.1(1) of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of attacking personnel, installations, material, units or vehicles involved in humanitarian assistance contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>788</sup>

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an international armed conflict.

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<sup>785</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (“Rome Statute”), Article 8(2)(b)(iii). This prohibition also forms a part of customary international law: ICRC, Customary IHL Study, Rule 31. Humanitarian Relief Personnel, Rule 32. Humanitarian Relief Objects and Rule 33. Personnel and Objects Involved in a Peacekeeping Mission.

<sup>786</sup> Additional Protocol I, Articles 70(4) and 71(2).

<sup>787</sup> Fourth Geneva Convention, Article 59.

<sup>788</sup> ICC Elements of Crimes, Article 8(2)(b)(iii).



7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### **3.2.27.1 Element One: The Perpetrator Directed an Attack.**

See Section 3.2.25.1 for a detailed explanation of this element.

### **3.2.27.2 Element Two: The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.**

This element requires practitioners to seek information demonstrating that the attack was directed at personnel, installations, material, units or vehicles involved in either: (i) a humanitarian assistance mission; or (ii) a peacekeeping mission in accordance with the Charter of the United Nations. Like other crimes involving attacks against protected persons and objects, there is no requirement for there to be actual damage or injury caused by the attack and the personnel or objects belonging to the humanitarian or peacekeeping mission must be the primary or sole object of the attack (see Sections 3.2.25.2 and 3.2.26.2 for a more detailed explanation of this element).<sup>789</sup>

#### **3.2.27.2.1 Humanitarian assistance missions**

Humanitarian assistance missions are “[e]ntities with a mission to prevent and/or alleviate human suffering in armed conflicts [which] are usually involved in: searching for, collecting and transporting the wounded and sick, missing and dead; providing medical treatment to the wounded and sick; assisting prisoners of war; and assisting the civilian population through the provision of humanitarian relief.”<sup>790</sup>

The ‘humanitarian relief’ provided by such missions consists of supplies essential to the survival of the civilian population, such as food, medical supplies, clothing and means of shelter.<sup>791</sup> Accordingly, Element Two protects from attack objects, such as installations, buildings and vehicles, and persons, such as administrative staff, coordinators, logistic experts, doctors, nurses, relief workers and other specialists working for such missions.<sup>792</sup>

In an armed conflict, humanitarian missions generally include:

- (i) The ICRC and National Red Cross or Red Crescent Societies;
- (ii) Medical units of neutral countries operating with the consent of their own government and the party to the conflict to which they are providing aid, provided that the adverse party to the conflict is informed in advance;
- (iii) International organisations such as the UN; and

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<sup>789</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009 (‘*Sesay et al.* Trial Judgment’), para. 220; *Abu Garda* Decision on the Confirmation of Charges, para. 65.

<sup>790</sup> ICRC Glossary, ‘Humanitarian organisations’.

<sup>791</sup> Additional Protocol I, Article 69. See also, O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (‘Triffterer & Ambos, *Commentary*’), p. 369.

<sup>792</sup> Triffterer & Ambos, *Commentary*, p. 369.

(iv) NGOs such as Médecins Sans Frontier ('MSF').<sup>793</sup>

In order to enjoy protection from attack, humanitarian missions must: (i) be humanitarian and impartial in character and act without adverse distinction to the parties to the conflict; (ii) refrain from engaging in the hostilities or carry out unfriendly acts; and (iii) refrain from interfering in the internal affairs of the parties to the armed conflict in which they operate.<sup>794</sup>

#### *3.2.27.2.2 Peacekeeping missions in accordance with the UN Charter*

The protection under this provision also extends to the personnel, installations, material, units or vehicles of peacekeeping missions established in accordance with the UN Charter. However, as there are currently no peacekeeping missions operating in Ukraine, this aspect of this war crime will not be elaborated on further.

#### *3.2.27.3 Element Three: The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.*

See Section 3.2.25.3 for a detailed explanation of this element.

#### *3.2.27.4 Element Four: Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.*

Humanitarian missions are protected against attack provided that they are 'entitled to the protection given to civilians or civilian objects under the international law of armed conflict'. This means that, if the objects of a humanitarian mission (e.g., its equipment, vehicles, etc.) are used for military purposes (i.e., their nature, location, purpose or use makes an effective contribution to the military action of a party to the conflict and their total or partial destruction, capture or neutralisation offers a definite military advantage), they constitute military objectives and, as such, lose their protection from attack (see Section 2.1.3.1.2).<sup>795</sup>

Similarly, if humanitarian personnel engage in the conduct of hostilities, i.e., take a direct part in the hostilities, they lose their protection from attack (see Section 2.1.3.1.1).<sup>796</sup> That being said, personnel involved in humanitarian assistance missions are entitled to use force in self-defence without losing their protection.<sup>797</sup>

#### *3.2.27.5 Element Five: The perpetrator was aware of the factual circumstances that established that protection.*

Finally, this element requires practitioners to demonstrate that the perpetrator was aware of the factual circumstances that established the protected status of the objects or persons involved in the humanitarian assistance mission. It is not necessary to establish that the perpetrator actually possessed the requisite legal knowledge regarding the protection to which the personnel and objects

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<sup>793</sup> ICRC Glossary, 'Humanitarian organisations'.

<sup>794</sup> Additional Protocol I, Article 70(1); Triffterer & Ambos, *Commentary*, p. 369.

<sup>795</sup> *Prosecutor v. Abu Garda*, IJC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010 ('*Abu Garda Decision on the Confirmation of Charges*'), para. 89.

<sup>796</sup> *Abu Garda Decision on the Confirmation of Charges*, para. 83; *Sesay et al. Trial Judgment*, para. 233.

<sup>797</sup> *Abu Garda Decision on the Confirmation of Charges*, para. 83.

were entitled under IHL, but they must have been aware of the factual circumstances that indicate such protection (e.g., the clothing of the humanitarian personnel or the emblems displayed by their installations or vehicles).<sup>798</sup>

### 3.2.27.6 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator directed an attack?</b>	<ul style="list-style-type: none"> <li>Did the perpetrators launch an actual attack?</li> <li>Did the attack amount to the use of physical force?</li> <li>Did the attack include artillery shelling, the firing of a missile, or the laying of mines?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that they witnessed a Russian airstrike destroying a building widely known to be the headquarters of MSF.</li> <li>A video recording of a humanitarian aid centre and a volunteer vehicle (both marked with the red cross symbol) being damaged by a Russian shelling attack..</li> <li>A photograph capturing the damage caused in the course of the attack on a humanitarian aid centre.</li> </ul>
<b>Does the evidence show that the object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance mission?</b>	<ul style="list-style-type: none"> <li>Did the attack target personnel, installations, material, units or vehicles involved in a humanitarian assistance mission?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that they saw an aerial bomb hit a warehouse containing humanitarian aid.</li> <li>A statement by the Ukrainian Red Cross describing how their volunteers driving to a humanitarian mission in the Kyiv region came under artillery fire and showing photos of the shrapnel holes in their vehicle.</li> <li>A satellite image depicting damage to an ICRC facility.</li> <li>A video recording the perpetrators shelling humanitarian aid personnel in a convoy.</li> <li>An MSF statement condemning an attack by Russian armed forces that affected four of its representatives.</li> <li>An ICRC report detailing how a Red Cross warehouse (marked with a red cross on its roof) in Mariupol was shelled twice.</li> </ul>
<b>Does the evidence show that the perpetrator intended such personnel,</b>	<ul style="list-style-type: none"> <li>Was the attack precisely directed at the protected personnel, installations, material, units, or vehicles?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that they saw the perpetrators indiscriminately targeting civilians and humanitarian personnel.</li> <li>A UN report describing that the attack was meticulously designed to target humanitarian facilities, e.g., the attack</li> </ul>

<sup>798</sup> *Abu Garda Decision on the Confirmation of Charges*, para. 94; *Sesay et al. Trial Judgment*, para. 235.

<b>installations, material, units or vehicles to be the object of the attack?</b>		<p>was not oriented towards the location of the enemy forces.</p> <ul style="list-style-type: none"> <li>• An expert report relating to the targeted installation describing the risks involved in attacks on such installations.</li> <li>• An ICRC report detailing how a Red Cross warehouse (marked with a red cross on the roof) in Mariupol was shelled twice.</li> </ul>
<b>Does the evidence show that such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict?</b>	<ul style="list-style-type: none"> <li>• Were the objects of a humanitarian mission (e.g., its equipment, vehicles, etc.) used for military purposes/was the humanitarian personnel directly engaged in the conduct of hostilities?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the perpetrators summarily executed individuals who had Red Cross insignia on their uniforms in order to prevent them from delivering food supplies.</li> <li>• A photograph depicting captured non-combatants including medical staff wearing medical uniforms.</li> <li>• A video showing the perpetrators shelling a humanitarian convoy with a Red Cross emblem.</li> <li>• An ICRC report detailing how a Red Cross warehouse (marked with a red cross on the roof) in Mariupol was shelled twice.</li> </ul>
<b>Does the evidence show that the perpetrator was aware of the factual circumstances that established that protection?</b>	<ul style="list-style-type: none"> <li>• Was the perpetrator aware that the targeted personnel/facilities were entitled to special protection under the international law of armed conflict?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the enemy forces indiscriminately targeted evacuation routes on days when evacuations were agreed to occur.</li> <li>• A UN report describing that, despite having the intelligence available to them, the enemy forces deliberately targeted a school in which the wounded were being held and treated.</li> <li>• A UN report indicating that a Russian attack on a humanitarian aid distribution event at a school in Vuhledar killed four people and injured several others.</li> <li>• An Amnesty International report which analysed photos and video from social media depicting a Russian missile attack killing 25 civilians in a humanitarian convoy in Zaporizhzhia.</li> <li>• A video showing the perpetrators summarily executing members of a humanitarian mission who wore protection emblems on their uniforms.</li> </ul>

Table 35: Article 8(2)(b)(iii) Cues for Practitioners

### 3.2.28 War Crime of Excessive Incidental Death, Injury or Damage (Article 8(2)(b)(iv), Rome Statute)

Article 8(2)(b)(iv) of the Rome Statute prohibits the intentional launching of an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>799</sup>

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to the intentional launching of an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). This conduct constitutes a serious violation of IHL pursuant to Article 57(2)(a)(iii) of Additional Protocol I, which provides that "those who plan or decide upon an attack shall [...] refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".<sup>800</sup>

"Damage to the natural environment" is also prohibited by Additional Protocol I, Articles 35(3) and 55(1), which prohibit "the [use of] methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment". As Ukraine is a party to Additional Protocol I, this conduct can be charged as attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be excessive in relation to the concrete and direct military advantage anticipated, under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of "an attack that is known to endanger the death or injury of civilians, damage to civilian objects or extensive, long-term and serious damage to the environment, which is clearly disproportionate to the specific and directly expected overall military advantage" under Article 438-2.2(2) of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of excessive incidental death, injury or damage contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>801</sup>

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and

<sup>799</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(iv). The war crime of excessive incidental death, injury or damage is also prohibited in the following international legal instruments: Additional Protocol I, Articles 35(3), 51(5)(b), 55(1) and 85(3)(b); Convention on the Prohibition of Military Techniques of any Hostile Use of Environmental Modification Techniques (10 December 1976) 1108 UNTS 151. Additionally, the war crime of excessive incidental death, injury or damage is customary in nature: ICRC, Customary IHL Database, Rule 14. Proportionality in Attack.

<sup>800</sup> Additional Protocol I, Article 57(2)(a)(iii). See also, Additional Protocol I, Article 85(3)(a).

<sup>801</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(iv).

that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### ***3.2.28.1 Element One: The Perpetrator Launched an Attack***

See Section 3.2.25.1 for a detailed explanation of this element.

### ***3.2.28.2 Element Two: The Attack Caused Incidental Death or Injury to Civilians or Damage to Civilian Objects or Widespread, Long-Term and Severe Damage to the Natural Environment and that Such Death, Injury or Damage Would be of Such an Extent as to be Clearly Excessive in Relation to the Concrete and Direct Overall Military Advantage Anticipated***

To establish this element, practitioners should seek information showing that the attack caused either: (i) incidental death or injury to civilians; (ii) damage to civilian objects; or (iii) widespread, long-term and severe damage to the natural environment.<sup>802</sup>

This element requires the persons killed or injured, or the objects damaged, to be civilian. The distinction between combatants and civilians, and military and civilian objects, is discussed above (see Section 2.1.3).

Moreover, the crime in question can also encompass “widespread, long-term and severe damage to the natural environment” as one of the possible forms of inflicted damage. “Natural environment” covers the biological environment in which a population is living,<sup>803</sup> including, e.g., water, air, soil, etc. It consists, for example, of objects indispensable to survival of the population, such as agricultural areas, drinking water and livestock, as well as forests and other vegetation, fauna, flora and other biological or climatic elements.<sup>804</sup> Additionally, under this element, all three preconditions of damage must be present at the same time, i.e., the damage must be widespread *and* long-term *and* severe:<sup>805</sup>

- **Widespread:** the effects of the damage go beyond the area of several hundred square kilometres.<sup>806</sup>

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<sup>802</sup> ICC Elements of Crimes, Article 8(2)(b)(iv).

<sup>803</sup> Y. Sandoz, et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) (*‘Commentary on the Additional Protocols’*), p. 663.

<sup>804</sup> *Commentary on the Additional Protocols*, p. 663.

<sup>805</sup> Triffterer & Ambos, *Commentary*, p. 378.

<sup>806</sup> Triffterer & Ambos, *Commentary*, p. 379.



- **Long-term:** the damage lasts for “decades (at least two or three) as opposed to months or a season”.<sup>807</sup>
- **Severe:** the damage prejudices the continued survival of the civilian population or involves the risk of major health problems.<sup>808</sup>

Practitioners must also establish that such death, injury or damage was of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>809</sup> It requires practitioners to view the anticipated military advantage from the perspective of the perpetrator(s), not the victim(s).<sup>810</sup>

In sum, this element sets out the proportionality test. It requires consideration of the following:<sup>811</sup>

1. The anticipated civilian damage or injury;
2. The anticipated military advantage; and
3. Whether the anticipated civilian damage or injury was “*clearly excessive*” in relation to the anticipated military damage.

The following factors may be relevant when considering whether the conduct of the perpetrator satisfies the proportionality test in a particular context:<sup>812</sup>

- Whether target selections were reviewed;
- Whether those who launched the attack were advised by military lawyers;
- Whether efforts were taken to reduce incidental damage;
- Whether precautionary measures were taken to reduce damage; and
- Whether precision weapons were used in the attack.

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<sup>807</sup> Triffterer & Ambos, *Commentary*, p. 379.

<sup>808</sup> Triffterer & Ambos, *Commentary*, p. 379.

<sup>809</sup> ICC Elements of Crimes, Article 8(2)(b)(iv).

<sup>810</sup> ICC OTP, ‘Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report’, 6 November 2014, para. 102; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2<sup>nd</sup> edn, OUP 2016) (‘Schabas, ICC: Commentary’), p. 265. See also, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Trial Judgement, 15 April 2011, para. 1755.

<sup>811</sup> ICC OTP, ‘Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report’, 6 November 2014, para. 101. See also, Schabas, ICC: Commentary, p. 265. Whereas the ICTY has held that in determining the proportionality of an attack, “it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack” (see e.g., *Galić* Trial Judgement, para. 58), the ICC adopts a higher standard. Specifically, the Rome Statute requires that the criminal prohibition only applies to those cases where the damage is *clearly* excessive (see, ICC OTP, ‘Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report’, 6 November 2014, para. 103.).

<sup>812</sup> ICC OTP, *Response to Communications Concerning the Situation in Iraq*, 10 February 2006, pp. 6-7; R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn, CUP 2014), p. 543.

**3.2.28.3 Element Three: The Perpetrator Knew that the Attack Would Cause Incidental Death or Injury to Civilians or Damage to Civilian Objects or Widespread, Long-term and Severe Damage to the Natural Environment and that such Death, Injury or Damage Would be of Such an Extent as to be Clearly Excessive in Relation to the Concrete and Direct Overall Military Advantage Anticipated**

Practitioners must also establish that the perpetrator had knowledge of the effect of the attack and that it would be clearly excessive in relation to the military advantage anticipated.<sup>813</sup> Put simply, this element is established where the perpetrator has awareness of the extent of the anticipated harm and the commensurate military advantage, and nonetheless decides to launch the attack.<sup>814</sup>

**3.2.28.4 General Contextual and Mental Elements**

Finally, practitioners should seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that an attack took place and that the perpetrator launched the attack?</b>	<ul style="list-style-type: none"> <li>• Did an act of violence take place against the adversary?</li> <li>• Did an attack take place, whether offensive or defensive in nature?</li> <li>• Was the perpetrator responsible for launching the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they saw residential buildings being destroyed or damaged by Russian airstrikes in Kharkiv.</li> <li>• Official military documents showing that the perpetrator ordered the shelling of a town.</li> <li>• Videos disseminated on social media of a cluster munition attack by Russian armed forces which killed one civilian and wounded two others in a street in the Kharkiv region.</li> <li>• Security video disseminated by Ukrainian media showing the moment at least two rockets hit a bus shelter outside a coal processing plant, which killed at least 10 people.</li> <li>• Ballistic evidence showing that a building was destroyed by missiles.</li> <li>• Pictures showing undetonated ordnance scattered around a city in the Sicheslav region.</li> <li>• A UN report documenting the use of cluster munitions, unguided rockets and air strikes by Russian armed forces to capture towns and smaller settlements.</li> </ul>
<b>Does the evidence show</b>	<ul style="list-style-type: none"> <li>• Were civilians killed or injured in an attack?</li> </ul>	<ul style="list-style-type: none"> <li>• Victim testimony from people who were injured by a missile strike, some of</li> </ul>

<sup>813</sup> ICC Elements of Crimes, Article 8(2)(b)(iv).

<sup>814</sup> R. Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014), p. 540.

<p><b>that the attack caused incidental death or injury to civilians, or damage to civilian objects, or widespread, long-term and severe damage to the natural environment?</b></p>	<ul style="list-style-type: none"> <li>• Were civilian objects, such as schools or hospitals, destroyed or damaged in an attack?</li> <li>• What elements of the natural environment were damaged as a result of the attack?</li> <li>• How vast was the affected area? Did the affected area cover, for example, more than hundreds of square kilometres?</li> <li>• How long-term were the harmful effects on the environment? Is it reasonable to assume that they will last, for example, for decades?</li> <li>• Did the damage to the environment cause serious consequences for human life and health, natural, economic or other resources and assets? Which exactly?</li> </ul>	<p>whom also lost relatives as a result of the attack.</p> <ul style="list-style-type: none"> <li>• Videos disseminated on social media of a cluster munition attack by Russian armed forces which killed one civilian and wounded two others in a street in the Kharkiv region.</li> <li>• Photographs depicting the aftermath of a Russian air strike that hit a theatre in Mariupol, which had been sheltering hundreds of civilians from Russian aerial assaults and had ‘children’ painted in Russian (‘дети’) in giant letters on the ground outside.</li> <li>• CCTV footage of a Russian missile blowing up an administrative building killing seven civilians and injuring 22.</li> <li>• Satellite imagery showing the destruction of over 10 kilometres of agricultural land after an attack against a dam caused flooding.</li> <li>• A UN report indicating that several munitions, including unguided rockets (which cannot be precisely targeted), struck an area in Chernihiv where more than 200 civilians were queuing for bread near a supermarket, killing at least 14 civilians and injuring 26.</li> </ul>
<p><b>Does the evidence show that the death, injury or damage was of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated?</b></p>	<ul style="list-style-type: none"> <li>• What was the military advantage that was anticipated by the perpetrator?</li> <li>• Was the military advantage concrete and direct?</li> <li>• Was the death, injury or damage caused clearly excessive in relation to this advantage?</li> </ul>	<ul style="list-style-type: none"> <li>• Intercepts of military commanders discussing launching an attack against a military target next to a hospital.</li> <li>• A military report that a bridge was mined to prevent the enemy from crossing, and that it was blown up during the day while civilians were trying to cross.</li> <li>• Weapons analysis showing that indiscriminate weapons were used during an attack.</li> <li>• Photographs depicting the aftermath of Russian cruise missiles hitting a shopping center and a dance studio that killed at least 23 people, including three children, in the Vinnytsia region.</li> <li>• A UN report detailing that over 100 people were killed during an attack.</li> </ul>
<p><b>Does the evidence show that the perpetrator</b></p>	<ul style="list-style-type: none"> <li>• Does the conduct of the perpetrator suggest that they knew of the presence of civilians or civilian</li> </ul>	<ul style="list-style-type: none"> <li>• Military documents presented to the perpetrator prior to an attack containing information on the likelihood of incidental civilian harm.</li> </ul>

<p><b>knew the attack would cause excessive incidental death, injury or damage in relation to the military advantage anticipated?</b></p>	<p>objects in close proximity to the targeted objective?</p> <ul style="list-style-type: none"> <li>• Do the methods employed during the attack suggest that the perpetrator knew excessive civilian harm would occur?</li> <li>• What circumstances existed at the time of the attack that show the perpetrator would have made a value judgement regarding the anticipated death, injury or damage?</li> </ul>	<ul style="list-style-type: none"> <li>• A Russian pilot admitting to being ordered to target civilian buildings.</li> <li>• Photographs taken prior to an attack clearly showing the presence of a school next to the military objective.</li> <li>• Forensic ballistics evidence showing that highly destructive explosives were used in place of precision weaponry.</li> <li>• Satellite imagery clearly showing the close proximity between the military objective and a residential building that was destroyed in an attack.</li> <li>• A UN report condemning attacks on the Kramatorsk train station and the Mariupol Drama Theatre and indicating that Russian armed forces are not taking precautions to prevent the incidental loss of civilian lives.</li> </ul>
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Table 36: Article 8(2)(b)(iv) Cues for Practitioners

### 3.2.29 War Crime of Attacking Undefended Places (Article 8(2)(b)(v), Rome Statute)

Article 8(2)(b)(v) of the Rome Statute prohibits “[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives”.<sup>815</sup> localities under Article 438(1) of the CCU.

While Article 438(1) of the Criminal Code of Ukraine (“CCU”) does not refer to attacking undefended places as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international treaties” as set out under Article 438(1). This conduct constitutes a serious violation of Article 59(1) of Additional Protocol I, which prohibits “Parties to the conflict [from] attack[ing], by any means whatsoever, non-defended localities.”<sup>816</sup> Additionally, “making non-defended localities and demilitarized zones the object of attack” is a grave breach of Additional Protocol I “when committed wilfully [...] and causing death or serious injury to body or health”.<sup>817</sup> As Ukraine is a party to Additional Protocol I, this conduct can be charged as attacking non-defended localities under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “attacks on unprotected and non-military targets, settlements or buildings” under Article 438-2.2(1) of the CCU. This

<sup>815</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(v). The war crime of attacking undefended places is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 3(c); Fourth Geneva Convention, Articles 14 and 53. Additionally, the war crime of attacking undefended places is customary in nature: ICRC, Customary IHL Database, Rule 37. Open Towns and Non-Defended Localities.

<sup>816</sup> Additional Protocol I, Article 59(1) *See also*, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (‘Hague Regulations’), Article 25.

<sup>817</sup> Additional Protocol I, Article 85(3)(d).

provision covers substantially the same contextual elements and specific elements of the war crime of attacking undefended places contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>818</sup>

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.
2. Such towns, villages, dwellings or buildings were open for unresisted occupation.
3. Such towns, villages, dwellings or buildings did not constitute military objectives.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**3.2.29.1 Element One: The Perpetrator Attacked One or More Towns, Villages, Dwellings or Buildings**

See Section 3.2.25.1 for a detailed explanation of this element.

**3.2.29.2 Element Two: Such Towns, Villages, Dwellings, or Buildings were Open for Unrestricted Occupation**

This element requires practitioners to establish that the targeted town, village, dwelling or building was open for unrestricted occupation, or in other words, undefended. To qualify, the following conditions must be met:<sup>819</sup>

- All combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
- No hostile use shall be made of fixed military installations or establishments;
- No acts of hostility shall be committed by the authorities or by the population; and
- No activities in support of military operations shall be undertaken.

An undefended place may lose its protected status once these conditions are no longer met.<sup>820</sup> That said, the presence of police forces whose sole purpose is maintaining law and order, or the presence of persons afforded special protection by the Geneva Conventions, does not result in a location losing its undefended status.<sup>821</sup>

**3.2.29.3 Element Three: Such Towns, Villages, Dwellings, or Buildings did not Constitute Military Objectives**

To establish the third element, the information must show that the targeted location did not constitute a military objective. Military objectives are discussed in depth in Section 2.1.3.

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<sup>818</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(v).

<sup>819</sup> Additional Protocol I, Article 59(2).

<sup>820</sup> ICRC, Customary IHL Database, Rule 37. Open Towns and Undefended Localities'.

<sup>821</sup> Additional Protocol I, Article 59(3).

Civilian objects temporarily lose their protection from attack for such time that they are considered to be a military object.<sup>822</sup> Consequently, it is important to establish that at the precise time of the attack, the object was not a military object.<sup>823</sup>

### 3.2.29.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that an attack took place and that the perpetrator launched the attack?</b>	<ul style="list-style-type: none"> <li>Did an act of violence take place against the adversary?</li> <li>Did the perpetrator use armed force against one or more towns, villages, dwellings or buildings?</li> <li>Was the attack part of a military operation?</li> </ul>	<ul style="list-style-type: none"> <li>Residents of Mariupol describing how they were forced to take shelter for weeks in a theatre during the constant shelling launched by the Russian armed forces.</li> <li>A Russian pilot admitting to being ordered to target civilian buildings.</li> <li>A mobile phone recording posted online of members of the armed forces coordinating a planned attack on a building.</li> <li>Forensic evidence showing that a building was destroyed by missiles.</li> <li>A UN Monitoring Mission report describing the large craters and destruction it observed in Chernihiv after several unguided bombs hit a residential neighbourhood.</li> </ul>
<b>Does the evidence show that the targeted town, village, dwelling, or building was undefended at the time of attack?</b>	<ul style="list-style-type: none"> <li>Was the town, village, dwelling, or building inhabited at the time of attack?</li> <li>Could the relevant locality have been taken into possession without any resistance?</li> <li>Were there enemy combatants present in the targeted locality?</li> <li>Were there any mobile weapons or military equipment in the targeted locality?</li> <li>Were there any hostile activities emanating from military installations present in the targeted locality?</li> </ul>	<ul style="list-style-type: none"> <li>The testimony of eyewitnesses who saw that members of the armed forces had visited a building prior to an attack and seen that it served no military purpose.</li> <li>Photographs depicting the aftermath of a Russian air strike that hit a theatre in Mariupol, which had been sheltering hundreds of civilians from Russian aerial assaults and had ‘children’ painted in Russian (‘дети’) in giant letters on the ground outside.</li> <li>Forensic evidence taken from an attack site showing that no weapons or other military equipment were present in a building before it was attacked.</li> <li>Video recordings of members of the armed forces leaving a village, taking with them all military installations and equipment.</li> </ul>

<sup>822</sup> *Katanga Trial Judgment*, para. 893.

<sup>823</sup> *Katanga Trial Judgment*, para. 893.



		<ul style="list-style-type: none"> <li>• An Amnesty International report detailing that 21 people died after a Russian airstrike on a residential area of Serhiivka and finding no evidence of Ukrainian troops, weapons or military targets nearby.</li> </ul>
<p><b>Does the evidence show that the targeted town, village, dwelling or building was not a military objective at the time of attack?</b></p>	<ul style="list-style-type: none"> <li>• Was the locality being used in any way by the armed forces of one of the parties to the conflict?</li> <li>• Were there any military objectives in the nearby area?</li> <li>• To whom did the targeted object belong?</li> <li>• What military advantage, if any, did the targeted object offer the party it belonged to?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they had to flee the bus stop they were waiting at with their friends because a Russian missile strike occurred resulting in the death of their friends.</li> <li>• Photographs disseminated from social media, news channels and NGOs of different buildings before they were attacked, clearly showing an absence of any military equipment.</li> <li>• Photographs depicting the aftermath of a Russian air strike on a theatre in Mariupol, which had been sheltering hundreds of civilians from Russian aerial assaults and had ‘children’ painted in Russian (‘дети’) in giant letters on the ground outside.</li> <li>• A video recording a humanitarian aid centre and a volunteer vehicle (both marked with the red cross symbol) being damaged by a Russian shelling attack.</li> <li>• An open-source report produced by an NGO documenting an attack on a building serving an exclusively civilian purpose, such as a school.</li> <li>• An official military document reporting that a town was thoroughly searched, and no enemy combatants or military equipment were found before it was attacked.</li> <li>• A UN report condemning attacks on the Kramatorsk train station and the Mariupol Drama Theatre and indicating that Russian armed forces are not taking precautions to prevent the incidental loss of civilian lives.</li> </ul>

Table 37: Article 8(2)(b)(v) Cues for Practitioners

### 3.2.30 War Crime of Killing or Wounding Persons *Hors de Combat* (Article 8(2)(b)(vi), Rome Statute)

Article 8(2)(b)(vi) of the Rome Statute prohibits “[k]illing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion”.<sup>824</sup> This war crime will occur when the perpetrator kills or wounds persons who are no longer participating in the fighting, who are rendered defenceless or who have clearly indicated their intent to surrender.

Article 438 of the Criminal Code of Ukraine (‘CCU’) explicitly refers to “use of methods of the warfare prohibited by international instruments”, which the war crime of killing or wounding persons *hors de combat* would fall under. This conduct amounts to a serious violation of Article 41 of Additional Protocol I, which stipulates that “[a] person who is recognized or who, in the circumstances, should be recognized to be ‘hors de combat’ shall not be made the object of attack.”<sup>825</sup> In addition, “making a person the object of attack in the knowledge that he is ‘hors de combat’” is a grave breach of Additional Protocol I when committed “wilfully [...] and causing death or serious injury to body or health”.<sup>826</sup> As this conduct is a method of warfare prohibited by an international instrument, it can be charged as making a person who is *hors de combat* the object of attack under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “injury of the person specified in subparagraph 3 of note 2 to this article”, which includes persons *hors de combat*, under Article 438.2(11) of the CCU. Although this crime is worded slightly differently than its Rome Statute counterpart, principally as ‘killing’ is not explicitly mentioned, persons *hors de combat* are still protected by the use of the word *injury*, which can cover both killing and wounding. As such, this provision covers substantially the same contextual elements and specific elements of the war crime of killing or wounding persons *hors de combat* contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>827</sup>

1. The perpetrator killed or injured one or more persons.
2. Such person or persons were *hors de combat*.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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<sup>824</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(vi). *See also*, First Geneva Convention, Article 3(1). The war crime of killing and wounding *hors de combat* persons is also prohibited by customary international law: *see*, ICRC, Customary IHL Database, Rule 47. Attacks against Persons Hors de Combat.

<sup>825</sup> Additional Protocol I, Article 41(1). *See also*, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (‘Hague Regulations’), Article 23(c).

<sup>826</sup> Additional Protocol I, Article 85(3)(e).

<sup>827</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’) Article 8(2)(b)(vi).

### 3.2.30.1 Element One: The Perpetrator Killed or Injured One or More Persons

First, practitioners should seek information showing that the perpetrator wounded or killed one or more persons. The perpetrator must have caused the killing or wounding by an act or omission.<sup>828</sup>

The **death** of one or more persons can be established by the recovery of a corpse(s), or through circumstantial evidence, provided that the person's death is the only reasonable inference available.<sup>829</sup>

Alternatively, **wounding or injury** implies physical injury, which may include injury caused by withholding essential medical treatment, denying food or water to prisoners of war or failing to rescue shipwrecked persons (provided there are no hazardous military circumstances rendering it impossible to do so).<sup>830</sup>

### 3.2.30.2 Element Two: Such Person or Persons were Hors de Combat

Second, it must be established that the victim was *hors de combat*. A combatant will be considered *hors de combat* if:<sup>831</sup>

- (i) They are in the power of an adverse party;
- (ii) They clearly express an intention to surrender; or
- (iii) They have been rendered defenceless because of unconsciousness, shipwreck, wounds or sickness.

Under the first category, combatants who fall into the power of an adverse party are presumed to be prisoners of war ('POWs').<sup>832</sup> POWs remain protected under this provision "from the time they fall into the power of the enemy and until their final release and repatriation".<sup>833</sup>

As per the second category, a "clear indication of unconditional surrender" renders a combatant *hors de combat*.<sup>834</sup> Such an indication can be expressed in a number of ways, including by laying down one's arms, raising one's hands or displaying a white flag.<sup>835</sup>

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<sup>828</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 ('Ongwen Trial Judgment'), para. 2696; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 ('Bemba Trial Judgment'), paras 87-88; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 ('Katanga Trial Judgment'), paras 767-769; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, ('Katanga & Chui Decision on the Confirmation of Charges') para. 287; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on Confirmation of Charges, 15 June 2009 ('Bemba Decision on Confirmation of Charges'), para. 132.

<sup>829</sup> *Katanga Trial Judgment*, para. 786; *Bemba Trial Judgment*, para. 88.

<sup>830</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), pp. 390-391, 395 ("the term 'injury' is commonly used to cover physical wounds or damage rather than damage to the mental health").

<sup>831</sup> Additional Protocol I, Article 41(2); ICRC, Customary IHL Database, Rule 47. Attacks against Persons Hors de Combat; ICRC, *Hors de combat*.

<sup>832</sup> Additional Protocol I, Article 45(1); Third Geneva Convention, Article 5. *See also*, Third Geneva Convention, Article 4.

<sup>833</sup> Third Geneva Convention, Article 5.

<sup>834</sup> ICRC, Customary IHL Database, Rule 47. Attacks against Persons Hors de Combat.

<sup>835</sup> ICRC, Customary IHL Database, Rule 47. Attacks against Persons Hors de Combat.

Under the third category, ‘wounded or sick’ refers to combatants who “because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care”.<sup>836</sup> ‘Shipwrecked’ refers to combatants “who are in peril at sea or in other waters as a result of misfortune affecting them in a vessel or aircraft carrying them”.<sup>837</sup>

In relation to all three categories, combatants rendered *hors de combat* will only be protected from attack provided that they abstain from any act of hostility and do not attempt to escape.<sup>838</sup>

### 3.2.30.3 Element Three: The Perpetrator was Aware of the Factual Circumstances that Established that Protected Status

To satisfy this element, it is not necessary to establish that the perpetrator had concluded, following an assessment of the situation, that the relevant person(s) was *hors de combat*.<sup>839</sup> It need only be demonstrated that a perpetrator was “aware of the factual circumstances that established the protected status”.<sup>840</sup> For example, that a person was visibly wounded or incapacitated, or waving a white flag in surrender.

### 3.2.30.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator killed or wounded one or more persons?</b>	<ul style="list-style-type: none"> <li>• Were one or more persons killed? Under what circumstances did their death(s) occur?</li> <li>• Were one or more persons physically injured? Under what circumstances did the injury occur?</li> <li>• What acts or omissions of the perpetrator caused the death or wounding?</li> <li>• Where and when did the death or wounding take place?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony of a former POW describing how captured enemy soldiers were routinely subjected to violence in detention.</li> <li>• An autopsy of a body of a deceased POW showing that they died of starvation while in detention.</li> <li>• A video recording of a captured Ukrainian soldier being shot by multiple automatic weapons in a shallow trench by Russian forces after saying “Glory to Ukraine”.</li> <li>• An international organisation report describing how POWs detained by Russia were routinely denied essential medical treatment, leading to serious injuries.</li> </ul>

<sup>836</sup> Additional Protocol I, Article 8(a).

<sup>837</sup> Additional Protocol I, Article 8(b).

<sup>838</sup> Additional Protocol I, Article 41(2); ICRC, *Hors de combat*.

<sup>839</sup> *See, Katanga Trial Judgment*, para. 900; *Katanga & Chui Decision on the Confirmation of Charges*, para. 316. Note, the ICC Pre-Trial Chamber and Trial Chamber made this finding in relation to the equivalent Element of Article 8(2)(b)(viii), namely that the perpetrator was aware of the factual circumstances that established the protected status of the property. *See, ICC Elements of Crimes*, Article 8(2)(b)(viii), Element 4.

<sup>840</sup> Rome Statute, Article 8(2)(a)(i), para.3; ICC *Elements of Crimes*, Article 8(2)(a)(i), fn. 33.

<p><b>Does the evidence show that the victim was <i>hors de combat</i> and that the perpetrator was aware of such status?</b></p>	<ul style="list-style-type: none"> <li>• Was the victim in the hands of the adverse Party?</li> <li>• Was the victim a POW?</li> <li>• Did the victim clearly indicate their intention to surrender, e.g., by placing their weapons on the ground and raising their hands in the air?</li> <li>• Was the victim wounded, sick or shipwrecked?</li> <li>• Was the perpetrator aware of these factual circumstances?</li> </ul>	<ul style="list-style-type: none"> <li>• A list of the names of all POWs detained at a certain location, confirming the victim's POW status.</li> <li>• A former POW testifying that he witnessed the death of at least one POW by a Russian soldier during an 'admission procedure' in the penal colony near Olenivka.</li> <li>• An autopsy on a person dressed in a soldier's uniform who died while being detained by enemy forces, showing that they died from untreated wounds.</li> <li>• A video recording posted online of a group of soldiers being fired upon despite having thrown their weapons on the ground indicating surrender.</li> <li>• A witness testifying that the perpetrator shot and killed the victim who was clearly incapacitated by injury and unable to defend himself.</li> <li>• A Commission report concluding that Russian armed forces have committed wilful killings of persons <i>hors de combat</i> in areas which came under their control.</li> </ul>
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Table 38: Article 8(2)(b)(vi) Cues for Practitioners

### 3.2.31 War Crime of Improper Use of a Flag of Truce (Article 8(2)(b)(vii)-1, Rome Statute)

Article 8(2)(b)(vii)-1 of the Rome Statute prohibits making improper use of a flag of truce resulting in death or serious personal injury.<sup>841</sup> This crime covers situations where a person displays a flag of truce – indicative of a desire to negotiate or suspend hostilities – for the ulterior purpose of gaining a military advantage or launching an attack against the enemy, which then results in death or serious personal injury.

Article 438 of the Criminal Code of Ukraine ('CCU') explicitly refers to "use of methods of the warfare prohibited by international instruments", which the war crime of making improper use of a flag of truce would fall under. This conduct is prohibited by Article 38(1) of Additional Protocol I, which states that "[i]t is [...] prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce". As this conduct is a method of warfare prohibited by

<sup>841</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(vii). The war crime of making improper use of a flag of truce is also prohibited in the following international legal instruments: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 ('Hague Regulations'), Article 23(f); Additional Protocol I, Article 38(1). Additionally, the war crime of making improper use of a flag of truce is customary in nature: ICRC, Customary IHL Database, Rule 58. Improper Use of the White Flag of Truce.

an international instrument, it can be charged as deliberately misusing the flag of truce under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “[i]llegal use [...] of a distinctive emblem or insignia established by international humanitarian law, the flag of a truce or a flag, military insignia or uniforms of the enemy or the United Nations, if this is caused by or caused the death of the victim” under Article 438-4.3 of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of improper use of a flag of truce contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>842</sup>

1. The perpetrator used a flag of truce.
2. The perpetrator made such use in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.
3. The perpetrator knew or should have known of the prohibited nature of such use.
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### ***3.2.31.1 Element One: The Perpetrator Used a Flag of Truce***

To establish this element, practitioners should seek information showing that the perpetrator used a flag of truce. A truce occurs when two warring sides have agreed to end the fighting, usually for a fixed time.<sup>843</sup> Traditionally, a flag of truce is a physical white flag used to indicate the desire of the person carrying it to communicate with the adversary.<sup>844</sup> However, as contemporary warfare is often conducted with modern means of technological communication, such as radio messages or dropping messages by aircraft, such modes of communication may be considered equal in status to the flag of truce in communicating a willingness to negotiate, engage in peace talks, surrender or cease hostilities.<sup>845</sup>

#### ***3.2.31.2 Element Two: The Perpetrator Made Such use in Order to Feign an Intention to Negotiate When There was no Such Intention on the Part of the Perpetrator***

To satisfy this element, practitioners must demonstrate that the perpetrator made improper use of the flag of truce in order feign an intention to negotiate when they had no such intention. The term “improper use” is to be understood as “any use other than that for which the flag of truce was

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<sup>842</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(vii)-1.

<sup>843</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (‘Triffterer & Ambos, Commentary’), p. 397.

<sup>844</sup> Triffterer & Ambos, *Commentary*, p. 397. See e.g., *Hague Regulations*, Article 32.

<sup>845</sup> Triffterer & Ambos, *Commentary*, p. 397 (citing German Joint Services Regulations, No. 1019, in Fleck (ed.), *Handbook* No. 230 (1999). See also, U.S. Army, *Field Manual* 27–10 (1956), No. 458(1) (second sentence)).



intended, namely a request to communicate, for example, in order to negotiate a cease-fire or to surrender”.<sup>846</sup> Thus, “improper use” includes the use of a flag of truce to gain a military advantage or to commit another act prohibited under IHL.<sup>847</sup> For example:

- The German military manual provides that “[t]he flag of truce is misused, for instance, if soldiers approach an enemy position under the protection of the flag of truce in order to attack”.<sup>848</sup>
- The US Army Field Manual states that flags of truce must not be used secretly in order “to obtain military information or merely to obtain time to affect a retreat or secure reinforcements or to feign a surrender in order to surprise an enemy”.<sup>849</sup>

### ***3.2.31.3 Element Three: The Perpetrator Knew or Should Have Known of the Prohibited Nature of Such Use***

To satisfy this element, it must be established that the perpetrator knew, or should have known, of the prohibited nature of such use.

The following factors will be relevant to a practitioner’s consideration of whether the perpetrator knew or should have known of the prohibited nature of the use of a flag of truce:

- Whether the perpetrator received any training on the rules of IHL. The UK, for example, produced a training video on IHL which explains how certain uses of flags and emblems are prohibited.<sup>850</sup>
- Whether such prohibited purposes were explained in any military manuals used by the armed group to which the perpetrator belongs.<sup>851</sup>
- The perpetrator’s position within the armed group, i.e., whether they were a commander.

### ***3.2.31.4 Element Four: The Conduct Resulted in Death of Serious Personal Injury***

To amount to a war crime, the improper use of a flag of truce must have resulted in death or serious personal injury. Crucially, it need not have been the perpetrator themselves who committed the killing or inflicted the serious personal injury.<sup>852</sup> Although neither the Rome Statute nor the jurisprudence have defined “serious personal injury” in this context, the ICRC Commentary to the Additional Protocols states that “the effect must be such that, even if it does not cause death, it will

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<sup>846</sup> ICRC, Customary IHL Database, Rule 58. Improper Use of the White Flag of Truce. *See also*, Triffterer & Ambos, *Commentary*, p. 395 (citing the second element of article 8 para. 2 (b) (vii)-2 to -4. Element Two of Article 8 para. 2 (b)(vii)-1 implies the same).

<sup>847</sup> ICRC, Customary IHL Database, Rule 58. Improper Use of the White Flag of Truce; Triffterer, p. 395.

<sup>848</sup> German Military Manual, para. 230.

<sup>849</sup> Department of the U.S. Army FM 27-10, *The Law of Land Warfare*, (Department of the Army, July 1956), no. 53.

<sup>850</sup> *See*, ICRC, Customary IHL Study, *Practice Relating to Rule 58. Improper Use of the White Flag of Truce*.

<sup>851</sup> For a list of relevant excerpts from military manuals, *see*, ICRC, Customary IHL Database, Rule 58. Improper Use of the White Flag of Truce.

<sup>852</sup> Triffterer & Ambos, *Commentary*, p. 395.

affect people in a long-lasting or crucial manner, either as regards their physical integrity or their physical and mental health”.<sup>853</sup>

### 3.2.31.5 Element Five: The Perpetrator Knew that the Conduct Could Result in Death or Serious Personal Injury

To satisfy this element, the perpetrator need not have been certain that their conduct would result in death or serious personal injury, only that such death or injury could have occurred “in the ordinary course of events”.<sup>854</sup> Accordingly, practitioners should evaluate the circumstances surrounding the perpetrator’s use of a flag of truce to determine whether it can be inferred that the perpetrator was aware that their use of a flag of truce in this manner could have resulted in death or serious personal injury. For example, if the flag of truce was used to launch a surprise attack using heavy artillery, it may be inferred that the perpetrator knew that death or serious personal injury would result.

### 3.2.31.6 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator used a flag of truce?</b>	<ul style="list-style-type: none"> <li>Did the perpetrator display a white flag? When and where was such a flag displayed?</li> <li>Did the perpetrator use any other method of communication, such as radio messages, to communicate a willingness to negotiate?</li> </ul>	<ul style="list-style-type: none"> <li>Testimonial evidence from members of the opposition armed forces describing how they saw members of the opposition approaching their position displaying a white flag.</li> <li>A recording of an intercepted radio communication during which a ceasefire was discussed.</li> <li>A military document describing how a flag of truce was used during an operation.</li> <li>Handwritten notes written by a soldier prior to an operation detailing how the flag of truce would be displayed in order to ambush the opposition.</li> <li>Pamphlets dropped by enemy aircraft requesting the two sides enter into negotiations.</li> <li>Eyewitness testimony that a group of soldiers approached an enemy position displaying a white flag, and then proceeded to open fire.</li> </ul>
<b>Does the evidence show that the perpetrator used</b>	<ul style="list-style-type: none"> <li>Is there any evidence to suggest that the perpetrator intended to deceive members of the opposing party to the</li> </ul>	<ul style="list-style-type: none"> <li>Testimonial evidence from a group of soldiers describing how they had received a radio communication requesting a truce that was followed</li> </ul>

<sup>853</sup> Y. Sandoz, et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), para. 3474.

<sup>854</sup> Triffterer & Ambos, *Commentary*, p. 396.

<p><b>a flag of truce in order to feign an intention to negotiate?</b></p>	<p>conflict by using the flag (or other form of communication)?</p> <ul style="list-style-type: none"> <li>• What was the purpose of displaying the flag of truce? What happened after?</li> <li>• Did the perpetrator gain a military advantage by using the flag of truce?</li> <li>• Did an attack follow a request for communication?</li> </ul>	<p>shortly after by a surprise attack by the requesting party.</p> <ul style="list-style-type: none"> <li>• A witness testifying that, after intercepting a radio communication wherein the enemy requested negotiations, a shelling attack launched from their position followed soon after.</li> <li>• Military diaries detailing meetings held prior to the displaying of the flag of truce which demonstrate that the intention behind such conduct was to feign an intention to negotiate.</li> <li>• A video posted online of soldiers approaching the contact line with a white flag, but opening fire as soon as the opposing party lowered their weapons.</li> </ul>
<p><b>Does the evidence show that the perpetrator knew or should have known that the particular use of the flag of truce was prohibited under IHL?</b></p>	<ul style="list-style-type: none"> <li>• Was the perpetrator a member of an armed formation? If so, for how long and what was their rank /position?</li> <li>• Did the perpetrator participate in any military training that covered the use of flags of truce?</li> <li>• Can the perpetrator's knowledge of the prohibited nature of such a use of a flag of truce be inferred from the circumstances?</li> <li>• Does the military manual of the perpetrator's party to the conflict cover the improper use of flags of truce?</li> <li>• Did the perpetrator possess a military manual?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony of soldiers stating that they received training on the proper use of flags of truce.</li> <li>• A military manual containing the applicable rules on the use of flags of truce found in the perpetrator's personal belongings.</li> <li>• A training video shown to all members of the armed forces to which the perpetrator belonged detailing the applicable rules on the proper use of flags of truce.</li> <li>• A photograph of attendees of a military training session at which the perpetrator was present.</li> </ul>
<p><b>Does the evidence show that the use of the flag of truce resulted in death or serious personal injury?</b></p>	<ul style="list-style-type: none"> <li>• Have one or more persons died? If so, under what circumstances?</li> <li>• Have one or more persons been seriously injured?</li> <li>• What kind of injuries have the victims suffered? Are they serious? Were they hospitalised as a result? Are there any long-term consequences?</li> <li>• What caused the victims' injuries?</li> <li>• Who were the victims? Did they belong to the opposing party to the conflict?</li> <li>• Is there any connection between the use of the flag of truce and the death and /or the death or injuries caused to the victims?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how UN troops were killed by the perpetrator after they displayed a flag of truce.</li> <li>• A video posted on social media showing a group of soldiers displaying a flag of truce then proceeding to launch an attack which resulted in the death a number of soldiers.</li> <li>• A military diary describing a strategy of using a flag of truce which resulted in death and injury to the adversary but a military advantage for the author's armed formation.</li> <li>• Photographs of soldiers in military hospital with serious injuries.</li> <li>• A medical report describing the long-term and serious effects of a soldier's injuries.</li> </ul>

<p><b>Does the evidence show that the perpetrator knew that the conduct could result in death or serious personal injury?</b></p>	<ul style="list-style-type: none"> <li>• What were the prevailing military circumstances at the time the perpetrator raised the flag?</li> <li>• Would the displaying of the flag have been taken seriously by the opposing forces, i.e., would they have stopped the fighting?</li> <li>• Was the perpetrator aware that the use of the flag would likely result in death or serious personal injury? Did they indicate through verbal comments or through their behaviour that this was the case?</li> <li>• Did the perpetrator communicate to others that they knew what the expected outcome would likely be?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from other soldiers in the perpetrator's unit describing how the perpetrator had told them that he knew of the likely consequences.</li> <li>• Military documents signed by the perpetrator describing how it was likely such a strategy would result in death.</li> <li>• An open-source report describing a pattern of conduct on the part of the perpetrator's side of the conflict of using flags of truce to launch ambushes against the enemy, which frequently resulted in death and serious injury.</li> </ul>
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Table 39: Article 8(2)(b)(vii)-1 Cues for Practitioners

### 3.2.32 War Crime of Improper Use of a Flag, Insignia or Uniform of the Hostile Party (Article 8(2)(b)(vii)-2, Rome Statute)

Article 8(2)(b)(vii)-2 of the Rome Statute prohibits making improper use of a flag, insignia or uniform of the hostile party resulting in death or serious personal injury.<sup>855</sup> This crime covers situations where a person uses a flag, insignia or uniform of a hostile party in a manner incompatible with the international law of armed conflict – i.e., while engaged in attacks or in order to shield, favour, protect or impede military operations – resulting in death or serious personal injury.

Article 438 of the Criminal Code of Ukraine ('CCU') explicitly refers to "use of methods of the warfare prohibited by international instruments", which the war crime of making improper use of a flag, insignia or uniform of the hostile party would fall under. This conduct is prohibited by Article 39(2) of Additional Protocol I, which provides that "[i]t is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations." As this conduct is a method of warfare prohibited by an international instrument, it can be charged as making use of a flag, military emblem, insignia or uniform of the adverse Party in order to shield, favour, protect or impede military operations under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of "[i]llegal use [...] of a distinctive emblem or insignia established by international humanitarian law, the flag of a truce or a flag, military insignia or uniforms of the enemy or the United Nations, if this is caused by or caused the death of the victim" under Article 438-4.3. This provision broadly aligns with the contextual elements and

<sup>855</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(vii). The war crime of making improper use of a flag, insignia or uniform of the hostile party is also prohibited in the following international legal instruments Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 ('Hague Regulations'), Article 23(f); Additional Protocol I, Article 39(2). Additionally, the war crime of making improper use of a flag, insignia or uniform of the hostile party is customary in nature: ICRC, Customary IHL Database, Rule 62. Improper Use of the Flags or Military Emblems, Insignia or Uniforms of the Adversary.

specific elements of the war of improper use of a flag, insignia or uniform of the hostile party contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>856</sup>

1. The perpetrator used a flag, insignia or uniform of the hostile party.
2. The perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.
3. The perpetrator knew or should have known of the prohibited nature of such use.
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### 3.2.32.1 Element One: The Perpetrator used a Flag, Insignia or Uniform of the Hostile Party

The first element requires practitioners to establish that the perpetrator used a flag, insignia or uniform of the hostile party. Under international humanitarian law ('IHL'), the facts necessary to establish this element will differ depending on whether the situation is one of land, naval or air warfare.

In terms of **land warfare**, it must be established that the perpetrator made use of a flag, military emblem, insignia or uniform of the hostile party while engaging in an armed attack or to shield, favour, protect or impede military operations.<sup>857</sup> For example, in the *Skorzeny and Others* case, the accused (German officers) were charged with improper use of American uniforms after entering into combat while wearing US military uniforms and firing upon and killing members of the US's armed forces.<sup>858</sup> Using the same camouflage as the enemy may also suffice to satisfy this element.<sup>859</sup>

While ruses of war are permissible in **naval warfare** (i.e., naval ships may fly enemy colours or display enemy markings to deceive the enemy), "warships and auxiliary vessels [...] are prohibited from launching an attack whilst flying a false flag" (i.e., the flag of the enemy).<sup>860</sup>

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<sup>856</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(vii)-2.

<sup>857</sup> Additional Protocol I, Article 39(2); O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, *Commentary*'), p. 398; K. Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2009) ('Dörmann, *Elements of War Crimes*'), p. 200.

<sup>858</sup> United States, General Military Court of the US Zone of Germany, *Skorzeny Case*, Judgement, 9 September 1947. See also, Dörmann, *Elements of War Crimes*, p. 200.

<sup>859</sup> See e.g., European Commission of Human Rights, *Chrysostomos and Papachrysostomou v. Turkey*, Report, 8 July 1993, paras 94-102.

<sup>860</sup> *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ICRC 1995), No. 110. See also, Triffterer & Ambos, *Commentary*, p. 400; Dörmann, *Elements of War Crimes*, p. 202.

In terms of **air warfare**, aircraft are never permitted to bear false markings.<sup>861</sup> This is confirmed by the 1923 Hague Rules of Air Warfare, which stipulates that “[t]he use of false markings is forbidden”.<sup>862</sup>

### ***3.2.32.2 Element Two: The Perpetrator Made Such Use in a Manner Prohibited Under the International Law of Armed Conflict While Engaged in an Attack***

When assessing this element, it is important to consider that not all uses of enemy flags, uniform or insignia are unlawful under the law of international armed conflict. Accordingly, in line with the wording of this element, practitioners must establish whether the perpetrator used the flag, uniform or insignia of the enemy “while engaged in an attack”<sup>863</sup> or during the preparatory stages of an attack.<sup>864</sup>

The use of enemy flags, uniforms or insignia will not amount to an improper use under the law of international armed conflict if they are used, for instance, for exercise purposes or by prisoners of war or grounded parachutists who try to get back to their lines.<sup>865</sup>

Additionally, as mentioned above, the use of enemy flags, uniforms or insignia during naval warfare is permitted as a lawful ruse of war; however, a warship must display its true colours before engaging in an attack against the enemy.<sup>866</sup> Conversely, any use of enemy flags or insignia by aircraft is prohibited.<sup>867</sup>

### ***3.2.32.3 Element Three: The Perpetrator Knew or Should Have Known of the Prohibited Nature of Such Use***

See Section 3.2.31.3 for a detailed explanation of this element.

### ***3.2.32.4 Element Four: The Conduct Resulted in Death of Serious Personal Injury***

See Section 3.2.31.4 for a detailed explanation of this element.

### ***3.2.32.5 Element Five: The Perpetrator Knew that the Conduct Could Result in Death or Serious Personal Injury***

See Section 3.2.31.5 for a detailed explanation of this element.

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<sup>861</sup> Triffterer & Ambos, *Commentary*, p. 400 (citing Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995), p. 184).

<sup>862</sup> Hague Rules of Air Warfare, Drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923, Article 19. See also, Triffterer & Ambos, *Commentary*, p. 400; Dörmann, *Elements of War Crimes*, pp. 203-204.

<sup>863</sup> ICC Elements of Crimes, Article 8(2)(b)(vii)-2.

<sup>864</sup> Y. Sandoz, et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) (*‘Commentary on the Additional Protocols’*), para. 1575 (citing Additional Protocol I, Article 44(3)).

<sup>865</sup> Triffterer & Ambos, *Commentary*, p. 400.

<sup>866</sup> *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, No. 110. See also, Triffterer & Ambos, *Commentary*, p. 400; Dörmann, *Elements of War Crimes*, p. 202.

<sup>867</sup> *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, No. 110. See also, Triffterer & Ambos, *Commentary*, p. 400; Dörmann, *Elements of War Crimes*, p. 202.



### 3.2.32.6 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator used a flag, insignia or uniform of the enemy?</b>	<ul style="list-style-type: none"> <li>Did the perpetrator wear the enemy uniform or display the enemy flag or emblem?</li> <li>Did a warship fly the flag of the hostile party?</li> <li>Did an aircraft bear false markings?</li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony from members of the enemy forces describing how the perpetrator opened fire against them while wearing their uniform.</li> <li>A video shared online of two sets of soldiers wearing the same uniform engaged in a gun fight.</li> <li>An official military document containing an order for members of a military unit to engage the enemy while wearing their uniform.</li> <li>Video footage of Russian soldiers wearing Ukrainian uniforms with white armbands in the Donetsk region.</li> <li>A photograph of Russian soldiers wearing Ukrainian uniforms while attempting to enter Kyiv.</li> </ul>
<b>Does the evidence show that the perpetrator used a flag, insignia, or uniform of the enemy during an attack?</b>	<ul style="list-style-type: none"> <li>Did the perpetrator wear the enemy uniform during an attack?</li> <li>Did the perpetrator display the enemy flag/emblem during an attack?</li> <li>Did a warship fly the flag of the hostile party during an attack?</li> <li>Did an aircraft bear false markings?</li> <li>Is there anything to suggest that the perpetrator intended to deceive members of the opposing party to the conflict by wearing their uniform?</li> <li>For what purpose did the perpetrator wear the enemy uniform/display the enemy flag or emblem?</li> </ul>	<ul style="list-style-type: none"> <li>Testimonial evidence from a group of soldiers describing how they were approached by soldiers in their own uniform who subsequently attacked them.</li> <li>A photograph of Russian soldiers wearing Ukrainian uniforms while attempting to enter Kyiv during the initial invasion of Ukraine.</li> <li>Video footage of Russian soldiers wearing Ukrainian uniforms with white armbands in the Donetsk region in order to attack Ukrainian armed forces.</li> <li>A sailor testifying that the warship that attacked his ship was flying the flag of his armed forces.</li> <li>Photos or videos of two warships opposed to one another flying the same flag and bearing the same insignia on their hulls.</li> <li>Military diaries detailing the decision to wear the enemy's uniform during an attack in order to gain an advantage over the enemy.</li> <li>A UN report indicating that there were widespread instances where enemy combatants using the uniforms and/or</li> </ul>

		insignia of their adversary during an attack.
<b>Does the evidence show that the perpetrator knew or should have known that the particular use of the flag, insignia, or uniform of the hostile party was prohibited under IHL?</b>	<ul style="list-style-type: none"> <li>• Was the perpetrator a member of an armed formation? If so, for how long and what was their rank/position?</li> <li>• Did the perpetrator participate in any military training that covered the use of enemy insignia, flags and uniform?</li> <li>• Can the perpetrator's knowledge of the prohibited nature of such a use of enemy flags, uniform or insignia be inferred from the circumstances?</li> <li>• Does the military manual of the perpetrator's party to the conflict cover the improper use of enemy flags, uniform and insignia?</li> <li>• Did the perpetrator possess a military manual?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony of soldiers stating that they received training on the proper use of enemy flags, insignia and uniform.</li> <li>• A military manual containing the applicable rules on the use of enemy flags, insignia and uniform found in the perpetrator's personal belongings.</li> <li>• A training video shown to all members of the armed forces to which the perpetrator belonged detailing the applicable rules on the proper use of such items.</li> <li>• A photograph of attendees of a military training session at which the perpetrator was present.</li> </ul>
<b>Does the evidence show that the use of the enemy flag, insignia or uniform resulted in death or serious personal injury?</b>	<ul style="list-style-type: none"> <li>• Have one or more persons died? If so, under what circumstances?</li> <li>• Have one or more persons been seriously injured?</li> <li>• What kind of injuries have the victims suffered? Are they serious? Were they hospitalised as a result? Are there any long-term consequences?</li> <li>• What caused the victims' injuries?</li> <li>• Who were the victims? Did they belong to the opposing party to the conflict?</li> <li>• Is there any connection between the use of the enemy flag, uniform or insignia and the injuries sustained by the victims?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a soldier describing how their unit was ambushed by soldiers wearing their uniform and a number of their fellow soldiers were killed or injured as a result.</li> <li>• A video posted on social media showing a warship firing a missile at another warship flying the same flag resulting in death and injury to those on the attacked ship.</li> <li>• Photographs of soldiers in military hospital with serious injuries.</li> <li>• A medical report describing the long-term and serious effects of a soldier's injuries.</li> </ul>
<b>Does the evidence show that the perpetrator knew that the conduct could result in death or serious personal injury?</b>	<ul style="list-style-type: none"> <li>• Under what circumstances did the perpetrator wear the enemy uniform?</li> <li>• Is there anything to suggest that the perpetrator planned on wearing the enemy uniform to launch a surprise attack against the enemy?</li> <li>• Was the perpetrator aware that the use of the enemy flag, uniform or insignia would likely result in death or serious personal injury? Did they indicate through verbal comments or through their behaviour that this was the case?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from other soldiers in the perpetrator's unit describing how the perpetrator had told them that he was planning to launch a surprise attack against the enemy by wearing their uniforms.</li> <li>• An official military order commanding a unit to kill enemy soldiers while wearing their uniforms.</li> <li>• Forensic ballistics evidence showing that the types of weapons used in an attack were specifically used in order to kill enemy soldiers.</li> <li>• Video footage of a unit of soldiers firing upon enemy forces while wearing their</li> </ul>

	<ul style="list-style-type: none"> <li>Did the perpetrator communicate to others that they knew what the expected outcome would likely be?</li> </ul>	uniforms, where it is clear the intention was to cause death.
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Table 40: Article 8(2)(b)(vii)-2 Cues for Practitioners

### 3.2.33 War Crime of Transfers, Directly or Indirectly, by the Occupying Power of Parts of its Civilian Population into the Territory it Occupies, or the Deportation or Transfer of All or Parts of the Population of the Occupied Territory Within or Outside this Territory (Article 8(2)(b)(viii), Rome Statute)

Article 8(2)(b)(viii) of the Rome Statute prohibits “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”.<sup>868</sup>

Article 438(1) of the Criminal Code of Ukraine (‘CCU’) explicitly refers to “deportation of civilian population to engage them in force labour”; however, this war crime will only apply when the purpose of the deportation is to engage the civilians in forced labour, and does not cover the transfer, by the Occupying Power, of parts of its own civilian population into the territory it occupies. Nevertheless, this deportation and transfer war crime is also covered by “other violations of rules of the warfare stipulated by international treaties” as set out under Article 438(1). This conduct constitutes a serious violation of the laws and customs of war as provided by Articles 49(1) and 49(6) of the Fourth Geneva Convention.<sup>869</sup> In addition, “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention” is a grave breach of Additional Protocol I when committed wilfully.<sup>870</sup> As Ukraine is a party to the Fourth Geneva Convention and Additional Protocol I, this conduct can be charged as the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of the “direct or indirect movement of part of the civilian population of the occupying State to the occupied territory, as well as the indirect movement of all or part of the population of the occupied territory both within this territory

<sup>868</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(viii). The war crime of the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 2(g); ILC, ‘Draft Code of Crimes Against the Peace and Security of Mankind’, Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, UN Doc. A/51/10, Article 20(c)(i). Additionally, this war crime is customary in nature: ICRC, Customary IHL Database, Rule 129. The Act of Displacement and Rule 130. Transfer of Own Civilian Population into Occupied Territory.

<sup>869</sup> Fourth Geneva Convention, Article 49(1): “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”, and Article 49(6): “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”.

<sup>870</sup> Additional Protocol I, Article 85(4)(a).

or outside it” under Article 438.1(1) of the CCU. This provision covers substantially the same contextual elements and specific elements of this war crime contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>871</sup>

1. The perpetrator:
  - (a) Transferred, directly or indirectly, parts of its own population into the territory it occupies; or
  - (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

See also Section 3.2.22, above, for discussion of the war crime of unlawful deportation or forcible transfer under Article 8(2)(a)(vii)-1 of the Rome Statute, which does not require the deported or transferred population to have been located in occupied territory.

### **3.2.33.1 Element One:**

#### **3.2.33.1.1 (a) *The Perpetrator Transferred, Directly or Indirectly, Parts of its own Population into the Territory it Occupies***

First, element one may be satisfied where the perpetrator transferred, directly or indirectly, parts of its own population into the territory it occupies. The word ‘transfer’ denotes a physical displacement of a prolonged duration of time.<sup>872</sup> Thus, a short-term relocation into the occupied territories, such as for tourism purposes under a tourist visa, would not amount to this crime.<sup>873</sup>

Persons transferred must belong to the Occupying Power’s own civilian population.<sup>874</sup> Civilians are any persons who are not members of either State or non-state armed forces.<sup>875</sup> Thus, the movement of members of the armed forces of the Occupying Power into the occupied territory to perform military tasks as occupiers does not constitute a crime under this provision. On the other hand, relocation of members of the armed forces who establish themselves permanently with their families in private settlements or houses in the occupied territory would be a crime under this provision.<sup>876</sup>

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<sup>871</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(viii).

<sup>872</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (‘Triffterer & Ambos, Commentary’), p. 410.

<sup>873</sup> Triffterer & Ambos, *Commentary*, p. 410.

<sup>874</sup> Triffterer & Ambos, *Commentary*, p. 410.

<sup>875</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014, para. 801.

<sup>876</sup> Triffterer & Ambos, *Commentary*, p. 410.

The phrase “directly or indirectly” means that two types of conduct can satisfy this element.<sup>877</sup> An example of *direct* transfer would be where the occupying authorities provide official settlement plans for its population, including the construction of residential buildings.<sup>878</sup> On the other hand, members of the occupying authorities may be found to have *indirectly* transferred parts of its population into the territory it occupies where it introduces policies to induce such transfer, such as economic and financial incentives, subsidies and tax benefits.<sup>879</sup>

Finally, settlements in occupied territory can amount to war crimes only if the Occupying Power’s authorities are involved, either directly or indirectly.<sup>880</sup> For example, when discussing alleged crimes committed by Israel in the West Bank and Jerusalem, the ICC’s 2015 Report on Preliminary Examination Activities referred to allegations that successive Israeli governments have established “a scheme of subsidies and incentives to encourage migration to the settlements and boost their economic development”.<sup>881</sup>

#### 3.2.33.1.2 OR (b) The Perpetrator Deported or Transferred all or Parts of the Population of the Occupied Territory Within or Outside this Territory

Second, and alternatively, the first element of this crime may be satisfied where the perpetrator deported or transferred all or parts of the population of the occupied territory within or outside this territory.

The deportation or transfer must be forcible, either physically or by other means of coercion. Accordingly, voluntary movements of civilians do not fall within the scope of this provision.<sup>882</sup>

Temporary evacuations for security and/or humanitarian reasons are not covered by this provision.<sup>883</sup> Nor are displacements driven by imperative military reasons according to Article 49 of the Fourth Geneva Convention, provided that the displaced persons are able to return as soon as the situation allows.<sup>884</sup> That said, this element will be established where such evacuation measures are used as a pretext to remove the civilian population and further seize control over the territory.<sup>885</sup>

#### **3.2.33.2 General Contextual and Mental Elements**

Finally, practitioners should also seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

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<sup>877</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (*‘Construction of a Wall Advisory Opinion’*), para. 120.

<sup>878</sup> UNSC Res 465, 1 March 1980, para. 5: described “Israel’s policy and practices of settling parts of its population and new immigrants in [the occupied] territories” as a “flagrant violation” of the Fourth Geneva Convention. *See also*, UNSC Res 446, 22 March 1979; UNSC Res 452, 20 July 1979.

<sup>879</sup> *Construction of a Wall Advisory Opinion*, para. 120; Triffterer & Ambos, *Commentary*, p. 411.

<sup>880</sup> Triffterer & Ambos, *Commentary*, pp. 410-411; *Prosecutor v. Boškoski et al.*, IT-04-82-T, Trial Judgment, 10 July 2008, para. 382.

<sup>881</sup> ICC OTP, ‘Report on Preliminary Examination Activities’ (12 November 2015), para. 68.

<sup>882</sup> *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001 (*‘Krstić Trial Judgment’*), paras 519–532.

<sup>883</sup> *Prosecutor v. Prlić*, IT-04-74, Trial Judgment, 29 May 2013, para. 53.

<sup>884</sup> *Krstić Trial Judgment*, paras 524-527; *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Judgment, 30 May 2013, para. 994.

<sup>885</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016, para. 492.

Element	Cues for Practitioners	Examples of Evidence
<p><b>Does the evidence show that nationals of the Occupying Power were transferred into occupied territory?</b></p>	<ul style="list-style-type: none"> <li>• Were one or more persons transferred into a territory?</li> <li>• Where was the relevant population transferred?</li> <li>• Was the territory to which the population was transferred occupied by an Occupying Power?</li> <li>• Where did the transferred persons reside before being transferred into the occupied territory?</li> <li>• Did the transferred population settle in the occupied territory, and were they provided with any housing or accommodation?</li> <li>• Did members of the transferred population acquire any property in the occupied territory? If so, how?</li> <li>• Why did the transferred population choose to migrate into the occupied territory?</li> <li>• Were the transferred persons coerced or incentivised into settling in the occupied territory?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from nationals of the Occupying Power explaining how they were offered financial incentives by their government to settle in the occupied territory.</li> <li>• Government documents detailing the policies designed to coerce/incentivise their citizens into moving to the occupied territory.</li> <li>• Photographs posted on social media showing the construction of housing and residential blocs by the Occupying Power in the occupied territory.</li> <li>• A UN report providing details of the economic incentives behind the transfer of a population into an occupied territory.</li> </ul>
<p><b>Does the evidence show that the perpetrator deported or transferred all or parts of the population of the occupied territory within or outside this territory?</b></p>	<ul style="list-style-type: none"> <li>• Was all or part of the population of the occupied territory transferred to another location?</li> <li>• Was the population transferred to another area within the occupied territory or outside that territory?</li> <li>• What caused the population to move locations?</li> <li>• Did the victims voluntarily leave, or were they forced/coerced?</li> <li>• Were the residents of an occupied territory living in inhumane conditions, or under permanent threat of persecution, forcing them to flee the territory?</li> <li>• Was the transfer a response to a humanitarian crisis or active hostilities occurring in the area? If so, were the displaced persons able to return at the soonest possible opportunity?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a transferred person testifying that members of the armed forces forcibly evicted them from their homes.</li> <li>• Forensic ballistics evidence showing that a locality was subjected to intense shelling prior to the displacement of the local population.</li> <li>• Video footage shared online showing members of the occupying authorities forcibly removing members of the local population from their homes.</li> <li>• News reports about the legal and policy measures Russian officials have taken regarding Ukrainian children that have been transferred to the Russian Federation.</li> <li>• Reports from an NGO explaining how the Occupying Power had created a climate of fear which forced the local population to flee.</li> <li>• A report by an international organisation on the forcible transfer of civilians from Mariupol to Russian-occupied areas of Ukraine and Russia. These transfers occurred in a coercive</li> </ul>



		environment due to the involvement of the military, the fact that Mariupol had been under siege and the fact that, where the civilians were willing to leave, they were nevertheless prevented from going to Ukrainian government-held areas.
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Table 41: Article 8(2)(b)(viii) Cues for Practitioners

### 3.2.34 War Crime of Intentionally Attacking Protected Objects (Article 8(2)(b)(ix), Rome Statute)

Article 8(2)(b)(ix) of the Rome Statute prohibits “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”.<sup>886</sup>

While Article 438(1) of the Criminal Code of Ukraine (‘CCU’) does not refer to intentionally attacking protected objects as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international instruments” as set out under Article 438(1). This conduct amounts to a violation of the laws and customs of war under Articles 27 and 56 of the 1907 Hague Regulations and Article 53 of Additional Protocol I.<sup>887</sup> In addition, it is a grave breach of Additional Protocol I, when committed wilfully, to “mak[e] the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement [...] the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives”.<sup>888</sup> As Ukraine is a party to Additional Protocol I, this conduct can be charged as making historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement the object of attack under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “an attack on a building intended for the purposes of religion, education, art, science or charity, a historical monument, a hospital or the location of the sick and wounded, if such objects are not military objectives” under Article 438-2.2(4) of the CCU. The provision covers substantially the same contextual elements and specific elements of the war crime of intentionally attacking protected objects contained in the ICC Rome Statute and Elements of Crimes.

<sup>886</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(ix). The war crime of intentionally attacking protected objects is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 3(d); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (‘Hague Regulations’), Article 27 and 56; First Geneva Convention, Articles 22-23, 34-35; Second Geneva Convention, Articles 18-19; and Additional Protocol I, Articles 12 and 53. This crime is also prohibited by the specialised instrument the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (e.g. Articles 3, 4, 5, 9) and its First Protocol.

<sup>887</sup> Hague Regulations, Articles 27 and 56; Additional Protocol I, Article 53. *See also*, ICRC, Customary IHL Database, Rule 38. Attacks Against Cultural Property.

<sup>888</sup> Additional Protocol I, Article 85(4)(d).

The elements of this crime are:<sup>889</sup>

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### ***3.2.34.1 Element One: The Perpetrator Directed an Attack***

See Section 3.2.25.1 for a detailed explanation of this element.

#### ***3.2.34.2 Element Two: The Object of the Attack was One or More Buildings Dedicated to Religion, Education, Art, Science or Charitable Purposes, Historic Monuments, Hospitals or Places where the Sick and Wounded are Collected, which are not Military Objectives***

##### ***3.2.34.2.1 The Building Belonged to One of the Listed Protected Categories***

When establishing the second element, it is first necessary to consider whether the targeted building(s) belonged to one of the following listed categories:

- **Buildings dedicated to religion:** churches, mosques or synagogues, as well as historic monuments, works of art or places of worship which constitute a people's spiritual heritage.<sup>890</sup>
- **Buildings dedicated to art:** works of art, art galleries or museums, as well as historic monuments and property dedicated to art which constitute a people's cultural heritage.<sup>891</sup>
- **Buildings dedicated to education:** schools and educational institutions as they are of great importance to the "cultural heritage of peoples in that they are without exception centres of

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<sup>889</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(ix).

<sup>890</sup> See, Hague Regulations, Article 27; Additional Protocol I, Article 53; Additional Protocol II, Article 16; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Articles 1 and 4; ICRC, Customary IHL Database, Rule 38. Attacks Against Cultural Property.

<sup>891</sup> See, Hague Regulations, Article 27; Additional Protocol I, Article 53; Additional Protocol II, Article 16; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Article 1; ICRC, Customary IHL, Rule 38. See also, *Prosecutor v. Jokić*, IT-01-42, Second Amended Indictment, 27 August 2003 ('Jokić Second Amended Indictment'), para. 19.

learning, arts, and sciences, with their valuable collections of books and works of art and science.”<sup>892</sup>

- **Buildings dedicated to science**, such as museums.<sup>893</sup>
- **Buildings dedicated to charitable purposes**: e.g., the headquarters or base of operations of civil society or non-governmental organisations working in a conflict zone or occupied territory to provide services to individuals such as children, women, internally displaced persons, etc.<sup>894</sup>
- **Historic monuments**: objects, landmarks or areas that are identifiable because of their particular historic, national, regional, local, religious or symbolic significance, and may include objects such as bridges, statues and archaeological sites, as well as entire historic/ancient towns or cities, or part thereof.<sup>895</sup>
- **Hospitals or places where the wounded and sick are collected**: e.g., a zone established to shelter the wounded and the sick from the effects of hostilities.<sup>896</sup>

#### 3.2.34.2.2 *The Building was not a Military Objective, i.e., an Object which “Offers a Definite Military Advantage”*

In addition, it is necessary to establish that the targeted building was not a military objective at the time of attack.<sup>897</sup> See Section 2.1.3.1 for an explanation of the distinction between civilian and military objectives.

#### 3.2.34.3 *Element Three: The Perpetrator Intended such Building or Buildings Dedicated to Religion, Education, Art, Science or Charitable Purposes, Historic Monuments, Hospitals or Places where the Sick and Wounded are Collected, which are not Military Objectives, to be the Object of the Attack*

This element is satisfied where the perpetrator directed the attack against the protected object intentionally, despite being aware of the object’s protected status and the fact that it did not constitute a military target at the time.<sup>898</sup> This means that the perpetrator meant to engage in the conduct.<sup>899</sup>

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<sup>892</sup> *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 360. See also, Additional Protocol I, Article 52(3); ICRC, Customary IHL Database, Rule 38. Attacks Against Cultural Property; Jokić Second Amended Indictment, para. 19.

<sup>893</sup> See, Hague Regulations, Article 27; Additional Protocol I, Article 52; ICRC, Customary IHL Database, Rule 38. Attacks Against Cultural Property. See also, Jokić Second Amended Indictment, para. 19.

<sup>894</sup> See, Hague Regulations, Article 27. See also, Jokić Second Amended Indictment, para. 19. Article 50 of the Fourth Geneva Convention ensures continuity of the educational and charitable work dedicated to children in occupied territory, such as child welfare centres, orphanages, children’s camps, etc. See, J. Pictet (ed), *Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War* (ICRC 1958), Article 50, pp. 286-287.

<sup>895</sup> See, *Prosecutor v. Jokić*, IT-01-42, Sentencing Judgement, 18 March 2004, para. 51; Hague Regulations, Article 27; Additional Protocol I, Article 53; Additional Protocol II, Article 16; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Article 1; ICRC, Customary IHL Database, Rule 38. Attacks Against Cultural Property; OECD Statistics, ‘Historic Monuments’ (12 November 2001).

<sup>896</sup> See, Hague Regulations of 1907, Article 27; First Geneva Convention, Article 23; Additional Protocol I, Article 52; ICRC, Customary IHL Database, Rule 35. Hospital and Safety Zones and Neutralized Zones.

<sup>897</sup> Additional Protocol I, Article 52(3).

<sup>898</sup> Triffterer & Ambos, *Commentary*, p. 421.

<sup>899</sup> Rome Statute, Article 30(2)(b).

Practitioners must demonstrate that such a building(s) was the *primary* object of the attack and was not merely attacked incidentally.<sup>900</sup> The lack of any military objectives in the vicinity of the targeted protected object may be relevant to establishing such intent.<sup>901</sup>

Intent can be established through the conduct of the perpetrator.<sup>902</sup> The nature of the attack and the specific conduct the perpetrator used to carry out the attack are relevant to this determination.<sup>903</sup> The type of weapon(s) used in an attack may also be indicative of intent.<sup>904</sup> For example, if houses were destroyed in an attack, practitioners should look for information that demonstrates that enemy combatants were not stationed there at the time of the attack.<sup>905</sup> In this regard, the testimony of local residents can confirm that no military personnel or equipment was seen entering or leaving the targeted buildings at any point prior to the attack.<sup>906</sup>

### 3.2.34.4 General Contextual Elements

Finally, practitioners should seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that an attack took place and that the perpetrator launched the attack?</b>	<ul style="list-style-type: none"> <li>• Was the act in question violent in nature?</li> <li>• Was there any damage caused by the violent act?</li> <li>• Did the attack occur in the context of ongoing hostilities between the alleged parties involved?</li> <li>• What means were used to carry out the attack?</li> <li>• Can the type of weaponry used in the attack be connected to the perpetrator?</li> <li>• Was the perpetrator responsible for launching the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• Testimony from eyewitnesses who saw the perpetrators physically carrying out the attack.</li> <li>• Open-source reports providing a detailed account of an attack against a religious building.</li> <li>• Forensic ballistics evidence showing that a historic monument was damaged by heavy shelling.</li> <li>• A video posted on social media showing a school being hit by a missile.</li> <li>• An official military document showing that an order was given to attack a protected building.</li> </ul>

<sup>900</sup> *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Trial Judgment, 31 March 2003 (*‘Naletilić and Martinović Trial Judgment’*), para. 605. *See also*, *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgment, 31 January 2005 (*‘Strugar Trial Judgment’*), paras 311-312; *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 599.

<sup>901</sup> *See*, *Strugar Trial Judgment*, paras 279, 288-289.

<sup>902</sup> *Katanga Trial Judgment*, paras 806-807: “In the Chamber’s view, that specific mental element may be inferred from various factors establishing that civilians not taking part in the hostilities were the object of the attack, such as the means and methods used during the attack, the number and status of the victims, the discriminatory nature of the attack or, as the case may be, the nature of the act constituting the attack”. *See also*, *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 91; *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgment, 30 November 2006, para. 132; *Blaškić Trial Judgment*, para. 512.

<sup>903</sup> *Katanga Trial Judgment*, paras 806, 807.

<sup>904</sup> *See e.g.*, *Prosecutor v. Martić*, IT-95-11-R61, Decision, 8 March 1996, paras 23-31.

<sup>905</sup> *See e.g.*, *Katanga Trial Judgment*, para. 944 where the ICC Trial Chamber considered that “safe for the houses where the [enemy troops] were quartered, there is no evidence to establish that by their nature, location and use, they constituted or could even be mistaken for military objectives” at the time of attack.

<sup>906</sup> For a detailed description of ‘military objective’, *see* Section 2.1.3.1.

<p><b>Does the evidence show that a protected object was the object of the attack?</b></p>	<ul style="list-style-type: none"> <li>• What type of building/object was targeted by the perpetrator?</li> <li>• What was the function /purpose of the targeted building?</li> <li>• Was the building: <ul style="list-style-type: none"> <li>◦ dedicated to religion?</li> <li>◦ dedicated to art?</li> <li>◦ dedicated to education?</li> <li>◦ dedicated to science?</li> <li>◦ dedicated to charitable purposes?</li> <li>◦ a historic monument?</li> <li>◦ a hospital or place where the wounded and sick were collected?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Testimony from international observers describing how a local hospital was regularly fired upon.</li> <li>• Forensic evidence showing the presence of religious items such as sacred texts in the remains of a building destroyed in an attack.</li> <li>• Satellite imagery showing that a historical monument was destroyed in an attack.</li> <li>• A World Health Organisation report indicating that more than 600 Ukrainian medical facilities have been destroyed by Russian airstrikes.</li> <li>• Statements published by UNESCO condemning attacks against protected historic buildings.</li> <li>• Photographs shared on social media depicting a school heavily damaged by shelling.</li> <li>• Reports by a human rights organisation that a theatre was bombed.</li> </ul>
<p><b>Does the evidence show that the targeted object(s) was not a military objective?</b></p>	<ul style="list-style-type: none"> <li>• Did the targeted object make an effective contribution to military action by its very nature (e.g., a military headquarters, or weapons storage)?</li> <li>• Did the targeted object make an effective contribution to military action in another way (i.e., by virtue of its location, purpose or use)?</li> <li>• Did the destruction of the targeted object offer the attacker a definite, concrete military advantage (e.g., gaining ground, or weakening enemy forces)?</li> <li>• Was the civilian object the primary target of the attack?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how a targeted building was used exclusively for civilian purposes (i.e., a school or hospital).</li> <li>• Documentary evidence of the destroyed school's register.</li> <li>• Photographs depicting the attacked the museum in a civilian district.</li> <li>• A military map showing that there were no military targets in the area near the attacked church.</li> <li>• Satellite imagery showing that no military objectives were present in the vicinity of the targeted object.</li> <li>• A UN report indicating that three hospitals in Chernihiv had been destroyed.</li> </ul>
<p><b>Does the evidence show that the perpetrator intended the protected object(s) to be the target of the attack?</b></p>	<ul style="list-style-type: none"> <li>• Are there any indications that the perpetrator intended to target the protected object(s)?</li> <li>• Was the targeted object repeatedly subjected to attacks, suggesting a pattern of conduct?</li> <li>• Were there any military objectives in close proximity to the targeted object?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how large emblems were displayed on the targeted building, such that its purpose was clearly identifiable.</li> <li>• Photographs of a building destroyed in the attack, where large religious symbols were clearly observable.</li> <li>• Military documents showing that the perpetrator identified a certain</li> </ul>

	<ul style="list-style-type: none"> <li>• Could the damaged building be clearly identified as a protected object, for instance, by observing its emblems?</li> <li>• Was the protected nature of the object well known among the local/international community?</li> <li>• Can the perpetrator's knowledge of the protected status of the object be inferred from their statements made prior to the attack?</li> </ul>	<ul style="list-style-type: none"> <li>historical monument as the target of the attack.</li> <li>• Satellite imagery collected by the army showing that no military objectives were located in the vicinity of the targeted object.</li> </ul>
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Table 42: Article 8(2)(b)(ix) Cues for Practitioners

### 3.2.35 War Crime of Treacherous Killing or Wounding (Article 8(2)(b)(xi), Rome Statute)

Article 8(2)(b)(xi) of the Rome Statute prohibits the war crime of treacherous killing or wounding (i.e., 'perfidy'),<sup>907</sup> which will occur when a perpetrator kills or wounds treacherously individuals belonging to the hostile nation or army.

Article 438(1) of the Criminal Code of Ukraine ('CCU') explicitly refers to "use of methods of the warfare prohibited by international instruments", which the war crime of treacherous killing or wounding would fall under. This conduct amounts to a serious violation of Article 37 of Additional Protocol I, which provides that "[i]t is prohibited to kill, injure or capture an adversary by resort to perfidy". As this conduct is a method of warfare prohibited by an international instrument, it can be charged as killing, injuring or capturing an adversary by resort to perfidy under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of "wounding of a person participating in hostilities by the use of perfidy" under Article 438-2.2(8) of the CCU. This provision covers the same contextual elements and the specific elements of the war crime of treacherous killing or wounding contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>908</sup>

1. The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
2. The perpetrator intended to betray that confidence or belief.
3. The perpetrator killed or injured such person or persons.

<sup>907</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(xi). The war crime of treacherous killing or wounding is also prohibited in the following international legal instruments: Lieber Code of 1863, Article 101; Brussels Declaration of 1874, Article 13(b); Oxford Manual of 1880, Articles 4, 8(b); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 ('Hague Regulations'), Article 23(b); Additional Protocol I, Article 37. Additionally, the war crime of treacherous killing or wounding is customary in nature: ICRC, Customary IHL Database, Rule 65. Perfidy. See also, O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (Triffterer & Ambos, *Commentary*), pp. 427-428.

<sup>908</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xi).



4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
5. Such person or persons belonged to an adverse party.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**3.2.35.1 Element One: The Perpetrator Invited the Confidence or Belief of One or More Persons That They were Entitled to, or Were Obligated to Accord, Protection under rules of International Law Applicable in Armed Conflict**

To establish this element, practitioners must seek information that the perpetrator acted in a way that invited the confidence of one or more persons in order to lead them to believe that:<sup>909</sup>

- (i) They were entitled to protection under IHL; *or*
- (ii) They were obliged to provide protection under IHL.

The following are examples of such acts:<sup>910</sup>

- Feigning an intent to negotiate under a flag of truce or surrender;
- Feigning incapacitation by wounds or sickness;
- Feigning of civilian, non-combatant status; and
- Feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not party to the conflict.

**3.2.35.2 Element Two: The Perpetrator Intended to Betray that Confidence or Belief**

This is a special intent requirement, which requires practitioners to establish that the perpetrator intentionally invited the confidence of the adversary in order to deliberately induce the adversary to rely upon the protection they expected in order to betray that confidence.

**3.2.35.3 Element Three: The Perpetrator Killed or Injured such Person or Persons**

The third element of this war crime requires the perpetrator to have killed or wounded the person or persons whose confidence the perpetrator invited.

Thus, for the war crime of treacherous killing or wounding to be established, practitioners must uncover information that one or more persons was killed or wounded by the perpetrator. In order to do this, the information must establish that the perpetrator killed or wounded the victim(s) through an act or omission by:<sup>911</sup>

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<sup>909</sup> Additional Protocol I, Article 37(1).

<sup>910</sup> Additional Protocol I, Article 37(1).

<sup>911</sup> *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 287.

1. Establishing that one or more persons is dead. This can be done either by identifying the dead body of the victim,<sup>912</sup> or by making inferences from circumstantial evidence such as: lack of contact by the victim with family or friends; the last known location of the victim being in an area that was attacked; the existence of a pattern of mistreatment of other victims by the perpetrator; and the coinciding or nearly coinciding time of death of other victims;<sup>913</sup> or
2. Establishing that one or more persons was wounded. Any level of injury will suffice to meet this element as the Rome Statute does not set out a requisite level of injury for this crime to be established.<sup>914</sup> This can be done by obtaining, *inter alia*, testimony from the victim and/or witnesses, photographs and/or medical reports relating to the injury.

#### 3.2.35.4 Element Four: The Perpetrator Made Use of that Confidence or Belief in Killing or Injuring Such Person or Persons

To satisfy this element, practitioners should seek information showing a causal link between the confidence or belief the perpetrator invited and the killing or injuring the perpetrator committed. This causal link requires the perpetrator to have participated in both the invitation of the confidence as well as the killing or injuring.<sup>915</sup> For example, “[s]tanding beside a fellow soldier holding up a white flag to deceive the adversary, and then killing an adversary by betraying that confidence so created, would be a sufficient participation in the invitation of the confidence”.<sup>916</sup>

#### 3.2.35.5 Element Five: Such Person or Persons Belonged to an Adverse Party

Practitioners must also establish that the victim(s) of the perpetrator’s perfidy “belonged to an adverse party” (i.e., belonged to the hostile nation or army), which includes both combatants and civilians.<sup>917</sup>

#### 3.2.35.6 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator invited the confidence or belief of one or more persons that they were entitled to, or</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator feign an intent to negotiate under a flag of truce?</li> <li>• Did the perpetrator feign an intent to surrender?</li> <li>• Did the perpetrator feign an intent to cease fire?</li> <li>• Did the perpetrator feign incapacitation by wounds or sickness?</li> </ul>	<ul style="list-style-type: none"> <li>• Video footage of soldiers walking out of a building with their hands up, before the last member opened fire on the opposing party.</li> <li>• Photographs depicting three alleged farmers, who were actually soldiers feigning civilian status, who drew weapons and fired on an adversary.</li> </ul>

<sup>912</sup> See e.g., *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Confirmation of Charges, 15 June 2009, para. 132.

<sup>913</sup> See e.g., *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Trial Judgment, 20 July 2009, para. 904.

<sup>914</sup> Triffterer & Ambos, *Commentary*, p. 432.

<sup>915</sup> Triffterer & Ambos, *Commentary*, p. 432.

<sup>916</sup> Triffterer & Ambos, *Commentary*, p. 432.

<sup>917</sup> Triffterer & Ambos, *Commentary*, p. 432.

<p><b>were obliged to accord, protection under IHL?</b></p>	<ul style="list-style-type: none"> <li>• Did the perpetrator feign civilian, non-combatant status?</li> <li>• Did the perpetrator feign protected status by using protective signs, emblems or uniforms?</li> </ul>	<ul style="list-style-type: none"> <li>• Reports describing tactics used by members of armed groups to gain the trust of the local population using emblems on their vehicles indicating that they were transporting humanitarian aid, when they were really transporting weapons to launch an attack on the village.</li> <li>• Intercepted communications of a perpetrator with their allies indicating how they were planning to feign a surrender, while other members of their armed group would attack the adversary at the same time.</li> </ul>
<p><b>Does the evidence show that the perpetrator intended to betray that confidence or belief?</b></p>	<ul style="list-style-type: none"> <li>• What was the purpose behind inducing the confidence or belief?</li> <li>• Was the perpetrator planning on breaching that confidence?</li> <li>• Was the perpetrator planning on killing or wounding the adversary?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that after surrendering, the soldiers made a signal after which one of them started shooting.</li> <li>• Photographs of soldiers with the insignia of the opposing armed forces on their uniform, which they were instructed to sow onto their uniform.</li> <li>• Intercepted communications of the perpetrator with two of his subordinates indicating that they were planning on breaching the confidence of the local population by presenting themselves as representatives of the ICRC.</li> </ul>
<p><b>Does the evidence show that the perpetrator killed or injured one or more persons?</b></p>	<ul style="list-style-type: none"> <li>• Who were the alleged perpetrators?</li> <li>• Did one or more persons die? When and where did it occur?</li> <li>• Did one or more persons suffer physical pain or suffering? When and where did this occur?</li> <li>• What acts or omissions caused the death or injury?</li> <li>• What circumstances surrounded the death or injury of the victim?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that members of their unit were killed.</li> <li>• A medical report indicating that the victim suffered injury as a result of a mortar attack.</li> <li>• A video posted on social media depicting a body laying lifeless in the street.</li> <li>• A photograph of a victim's corpse.</li> <li>• A death certificate of the victim.</li> </ul>
<p><b>Does the evidence show that the perpetrator made use of the confidence or belief they invited by killing or injuring such person or persons?</b></p>	<ul style="list-style-type: none"> <li>• In what context did the killing/wounding occur?</li> <li>• Who participated in the commission of the attack?</li> <li>• Was the killing/wounding carried out by the person who induced the confidence?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony that the perpetrator led them to believe they were a humanitarian convoy to enable them access to a checkpoint before opening fire at close range.</li> <li>• Documents indicating that there was a written appeal of an armed group leader asking for a ceasefire, which, when granted, was used by the armed group to intensify the indiscriminate shelling of the concerned area and its military and civilian inhabitants.</li> </ul>

		<ul style="list-style-type: none"> <li>• Weapons that were treacherously smuggled through a checkpoint as Red Cross cargo and then used against servicemen present in the area, including those guarding the checkpoint, killing them all.</li> <li>• Video footage of the opposing armed forces moving closer to the perpetrators who had feigned surrender and who opened fire when the opposing armed forces came closer.</li> </ul>
<b>Does the evidence show that the victims belonged to the hostile nation or army?</b>	<ul style="list-style-type: none"> <li>• To which side of the armed conflict did the victim belong?</li> <li>• Was the victim a different nationality to the perpetrator?</li> <li>• Was the victim a civilian or a combatant?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a villager indicating that the victim was his neighbour that fought against the Russian armed forces to which the perpetrator belonged.</li> <li>• Property records indicating that the victim's domicile was registered in an area vastly dominated by the followers of the pro-governmental group who were fighting against a separatist armed group.</li> <li>• Photographs showing that the deceased soldier wore a uniform of an adverse party.</li> <li>• NGO reports indicating that the residents of a particular area were targeted by an adverse armed group with the goal to take over that territory by any means.</li> </ul>

Table 43: Article 8(2)(b)(xi) Cues for Practitioners

### 3.2.36 War Crime of Destroying or Seizing the Enemy's Property (Article 8(2)(b)(xiii), Rome Statute)

Article 8(2)(b)(xiii) of the Rome Statute prohibits “destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war”.<sup>918</sup>

While Article 438(1) of the Criminal Code of Ukraine (‘CCU’) does not refer to destroying or seizing the enemy's property as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international instruments” as set out under Article 438(1). “[E]xtensive destruction and

<sup>918</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(xiii). The war crime of destroying or seizing the enemy's property is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 3(b); Statute of the Iraqi Special Tribunal, Section 6.1(b)(xiii), Article 13(b), No. 14; Fourth Geneva Convention, Article 53. Additionally, the war crime of destroying or seizing the enemy's property is customary in nature: ICRC, Customary IHL Database, Rule 50. Destruction and Seizure of Property of an Adversary.

appropriation of [protected] property, not justified by military necessity and carried out unlawfully and wantonly” is classified as a grave breach of the First, Second and Fourth Geneva Conventions.<sup>919</sup> As Ukraine is a party to these treaties, this conduct, if committed against property protected by the Geneva Conventions, can be charged as extensive destruction and appropriation of property not justified by military necessity under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of “[d]eliberate [...] seizure or damage or destruction of property, if it is not justified by military necessity” under Article 438-1.1 of the CCU. It should be noted that Draft Bill 7290 does not include the requirement that the destroyed property belong to an adversary, meaning their scope of application will be broader than that of Article 8(2)(b)(xiii) of the Rome Statute. Beyond this difference, the provision covers substantially the same contextual elements and specific elements of the war crime of destroying or seizing the enemy’s property contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>920</sup>

1. The perpetrator destroyed or seized certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

### **3.2.36.1 Element One: The Perpetrator Destroyed or Seized Certain Property**

Practitioners should seek to establish that certain property was either destroyed or seized and that the perpetrator caused this destruction or seizure. “Certain property” may include moveable or immoveable property, and public or private property.<sup>921</sup>

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<sup>919</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; and Fourth Geneva Convention, Article 147. *See also*, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (‘Hague Regulations’), Article 23(g).

<sup>920</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(xiii).

<sup>921</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 (‘Katanga Trial Judgment’), para. 892; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019, para. 1152.

#### 3.2.36.1.1 *Destruction*

To establish destruction, it must be established that the property in question was either partially or completely destroyed.<sup>922</sup> The destruction can occur by act or omission.<sup>923</sup> Examples of acts of destruction include: setting ablaze; demolishing; or otherwise damaging property.<sup>924</sup>

#### 3.2.36.1.2 *Seizure*

To establish that property has been seized (i.e., appropriated), the practitioner needs to establish that the perpetrator took “any property (movable or immovable) [...], for whatever use, irrespective of the type of ownership (public or private)”.<sup>925</sup> Thus, the control of the property in question must have been transferred from the owner to the perpetrator.<sup>926</sup>

#### 3.2.36.2 *Element Two: Such Property was Property of a Hostile Party*

To prove this element, practitioners should then seek to establish that the destroyed or seized property in question belonged to an ‘enemy’ or ‘hostile’ party to the conflict. This means that the property in question – whether moveable or immovable, private or public – must belong to individuals or entities allied with or with allegiance to a party to the conflict adverse or hostile to the perpetrator.<sup>927</sup> In this regard, practitioners should consider the ethnicity, nationality and/or place of residence of the individuals to whom the destroyed or seized property belonged.<sup>928</sup>

#### 3.2.36.3 *Element Three: Such Property was Protected from that Destruction or Seizure Under the International Law of Armed Conflict*

To establish this element, practitioners must determine whether the destroyed or seized property was protected under international humanitarian law (‘IHL’). There are three primary categories of property: moveable public property; immovable public property; and private property. Each will be discussed in turn, below.

##### 3.2.36.3.1 *Moveable public (i.e., government) property*

Movable government property that can be used for military operations (e.g., attacks, operations to secure an area, intelligence gathering to support an offensive, etc.<sup>929</sup>) may be seized/confiscated and would therefore not be protected from seizure or destruction under this provision.<sup>930</sup>

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<sup>922</sup> *Katanga* Trial Judgment, para. 891.

<sup>923</sup> *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, (*Katanga & Chui* Decision on the Confirmation of Charges), para. 310; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011 (*Mbarushimana* Decision on the Confirmation of Charges), para. 171

<sup>924</sup> *Katanga* Trial Judgment, para. 891.

<sup>925</sup> Y. Dinstein, *The International Law of Belligerent Occupation* (2<sup>nd</sup> edn, CUP 2019), p. 228.

<sup>926</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016, para. 115.

<sup>927</sup> *Katanga & Chui* Decision on the Confirmation of Charges, para. 310; *Mbarushimana* Decision on the Confirmation of Charges, para. 171.

<sup>928</sup> *Katanga* Trial Judgment, para. 892.

<sup>929</sup> *Prosecutor v. Ntaganda*, ICC-01-04-2/06 A2, Amicus Curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence, 18 September 2020, para. 9 (citing Travaux Préparatoires of 1977 Additional Protocol I to 1949 Geneva Conventions, CDDH/III/SR.2 of 2 March 1974, XIV, paras 8, 14).

<sup>930</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (‘Hague Regulations’), Article 53: “[a]n army of occupation can only take



However, “[t]he property of municipalities [i.e., cities, towns, villages, etc.], that of institutions dedicated to religion, charity and education, the arts and sciences, shall be treated as private property”, meaning it cannot be seized or destroyed by the Occupying Power.<sup>931</sup> Additionally, movable cultural property is also ‘public property’ that is specifically protected from all forms of theft, pillage, misappropriation, vandalism and requisition.<sup>932</sup> The destruction or seizure of such property would therefore satisfy this element.

#### *3.2.36.3.2 Immovable public property*

Immovable public property, i.e., public buildings, real estate, forests, parks and agricultural land belonging to the hostile State, can be used by the Occupying Power but cannot be permanently seized/confiscated as “[t]he occupying State shall be regarded only as administrator and usufructuary of [property] belonging to the hostile State, and situated in the occupied country”.<sup>933</sup> Additionally, the Occupying Power cannot destroy such property as that would violate its obligation as administrator and usufructuary.<sup>934</sup> As such, destruction or seizure of immovable public property would satisfy this element.

#### *3.2.36.3.3 Private property*

Private property, e.g., civilian homes, stores, museums and schools, cannot be seized/confiscated or destroyed by the Occupying Power.<sup>935</sup> However, private property which may be used for hostile purposes (i.e., to harm the Occupying Power), such as appliances for the transmission of news or transport, depots of arms and all kinds of munitions of war, may be seized, “but must be restored and compensation fixed when peace is made”.<sup>936</sup> As such, the destruction or seizure of private property – unless it can be used for hostile purposes – would satisfy this element.

#### ***3.2.36.4 Element Four: The Perpetrator was Aware of the Factual Circumstances that Established the Status of the Property***

This element does not require that the perpetrator has specific knowledge that the object in question was granted protected status under IHL.<sup>937</sup> Instead, it is only necessary to demonstrate that the perpetrator was “aware of the factual circumstances that established the protected status” of the relevant objects.<sup>938</sup> In other words, practitioners should seek information showing that the perpetrator was aware of the factual circumstances which place the relevant property in one of the

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possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations”.

<sup>931</sup> Hague Regulations, Article 56. *See, below. See also, Hague Regulations, Article 46: “[...] private property [...] must be respected. Private property cannot be confiscated”.*

<sup>932</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, Articles 4(3), 14(1).

<sup>933</sup> Hague Regulations, Article 55.

<sup>934</sup> The Oxford Dictionary of Law defines usufruct as “[t]he right of reaping fruits (*fructus*) of things belonging to others, without destroying or wasting the subject over which such rights extend”.

<sup>935</sup> Hague Regulations, Article 46.

<sup>936</sup> Hague Regulations, Article 53.

<sup>937</sup> *Katanga Trial Judgment*, para. 793, fn. 1831.

<sup>938</sup> ICC Elements of Crimes, Article 8(2)(a)(i), para. 3.

above-listed protected categories. This element would be satisfied, for example, where the perpetrator seized religious artefacts.<sup>939</sup>

### 3.2.36.5 Element Five: *The Destruction or Seizure was not Justified by Military Necessity*

See Section 3.2.19.2 for a detailed explanation of this element.

### 3.2.36.6 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator destroyed or seized property?</b>	<ul style="list-style-type: none"> <li>• Was certain property partially or completely destroyed?</li> <li>• Was certain property taken under the perpetrator's control?</li> <li>• Under what circumstances was the property destroyed or seized?</li> <li>• Was the property of a private or a public nature?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how enemy soldiers routinely evicted civilians from their homes in order to live in their dwellings themselves in the course of military operations.</li> <li>• Local police reports establishing that residents were evicted from their homes and had their private property stolen by enemy armed forces.</li> <li>• Photographs showing that houses were destroyed by shelling attacks.</li> <li>• A witness, the headmaster of a school in Hostomel, testifying that the Russian armed forces that had occupied the village had destroyed more than 250 computers, furniture and virtually all of the windows and doors in the school, and had shared photos of the destruction.</li> <li>• Reports from NGOs documenting instances of private businesses and the items they sell being seized by members of the armed forces of one of the parties to the conflict.</li> <li>• A video posted on social media showing a local church being damaged in an attack.</li> </ul>
<b>Does the evidence show that the property belonged to the adversary?</b>	<ul style="list-style-type: none"> <li>• To whom did the relevant property belong?</li> <li>• What was the ethnicity or nationality of the owner of the property?</li> <li>• To which party to the conflict did the owner of the property align with or belong?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing a pattern of property belonging to Ukrainian civilians being destroyed or seized by the Russian forces.</li> <li>• Police reports describing several incidents of enemy soldiers looting civilian homes following their invasion of the town.</li> </ul>

<sup>939</sup> Such public movable property is protected from seizure under Article 56 of the *Hague Regulations*, provided that it may not be used for hostile purposes.

	<ul style="list-style-type: none"> <li>Members of which side of the conflict destroyed or seized the relevant property?</li> </ul>	<ul style="list-style-type: none"> <li>Forensic evidence showing the burnt remains of property belonging to a Ukrainian civilian following a shelling attack launched by the Russian armed forces.</li> <li>Photographs of damaged objects which belong to Ukrainian civilians.</li> <li>Open-source reports describing several incidents of civilians being evicted from their homes by Russian soldiers.</li> <li>A report indicating that, on its visit to Chernihiv, it saw dozens of houses and other buildings that had been destroyed or damaged during the attempt by the Russian armed forces to take the city.</li> </ul>
<p><b>Does the evidence show that the property was protected from destruction or seizure under IHL?</b></p>	<ul style="list-style-type: none"> <li>What type of property was destroyed or seized?</li> <li>Was the affected property privately or publicly owned?</li> <li>Is the destruction or seizure of the property in question prohibited by IHL?</li> <li>What circumstances surrounded the targeting of the property?</li> <li>Where did the crime take place?</li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony of local residents that they saw Russian soldiers who were occupying their town stealing food and alcohol, personal belongings, valuables, computers and household items, such as washing machines and microwaves, from stores and houses.</li> <li>A video of soldiers shelling a museum.</li> <li>Satellite imagery of a residential area before and after a shelling attack displaying the extensive destruction of private property.</li> <li>Reports by international organisations indicating that soldiers were looting and destroying civilians' private businesses.</li> </ul>
<p><b>Does the evidence show that the perpetrator was aware of the factual circumstances that established the status of the property?</b></p>	<ul style="list-style-type: none"> <li>What are the indications that the perpetrator was aware of the factual circumstances that established the status of the property?</li> <li>How much information did the perpetrator have regarding the property?</li> <li>Was the perpetrator at the crime scene during the commission of the crime?</li> <li>Did the perpetrator issue/receive any instructions regarding targeting the property in question?</li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony describing that they had seen soldiers walking through the destroyed area before the attack, indicating that they were aware that the targeted property was civilian homes.</li> <li>Witness testimony describing how the perpetrator ordered the soldiers to take control of the local school.</li> <li>Military documents indicating that a planned attack was to bombard a civilian neighbourhood.</li> <li>Video of soldiers looting private homes and businesses depicting the perpetrator's presence and participation.</li> <li>Intercepted phone calls between the perpetrator and their family back home informing them that they took TVs and</li> </ul>

		other items from the houses located in a town their unit is occupying.
<b>Does the evidence show that the relevant property did not constitute a military objective?</b>	<ul style="list-style-type: none"> <li>• What type of object was destroyed/damaged or seized by enemy forces?</li> <li>• Was the relevant property being used in any way by the armed forces of one of the parties to the conflict?</li> <li>• What military advantage, if any, did the damaged or destroyed property offer the party it belonged to?</li> </ul>	<ul style="list-style-type: none"> <li>• Testimony from a witness describing how no military objects were situated within their residential neighbourhood before it was destroyed by enemy forces.</li> <li>• Satellite imagery showing that no military objectives were present in the vicinity of the private property seized by members of the Russian armed forces.</li> <li>• Photographs taken of the inside of a school clearly showing that no weapons or other military objects were housed there before it was destroyed by Russian shelling.</li> <li>• A timetable posted online showing that the destroyed building was being used as civilian train station.</li> </ul>
<b>Does the evidence show that the destruction of the relevant property was indispensable for military reasons?</b>	<ul style="list-style-type: none"> <li>• What type of property was damaged or destroyed?</li> <li>• What was the purpose of the relevant property? How was it used by the victims?</li> <li>• What concrete military advantage did the perpetrator gain by destroying, damaging, or seizing the relevant property?</li> <li>• Did the appropriation or destruction of the relevant property advance the war effort in some way?</li> <li>• Was the destruction/appropriation of the relevant property essential for the attainment of the connected military advantage?</li> </ul>	<ul style="list-style-type: none"> <li>• Testimony of international observers describing how enemy soldiers broke into a store and stole valuable objects which had no conceivable military use, such as household appliances and jewellery.</li> <li>• Official military documents describing how control was lost over military units after an attack on a town, which rendered it impossible to register all war booty.</li> <li>• Satellite footage showing that a village was destroyed by missiles despite not a single military objective being located therein, nor in its close vicinity.</li> <li>• A report from an international organisation detailing how, even after enemy forces secured control over a locality (thereby achieving their military goal), soldiers proceeded to evict locals from their homes without justification.</li> <li>• Video footage of soldiers sending home parcels alleged to contain the property they looted from civilian homes.</li> </ul>

Table 44: Article 8(2)(b)(xiii) Cues for Practitioners

### **3.2.37 War Crime of Compelling Participation in Military Operations (Article 8(2)(b)(xv), Rome Statute)**

Article 8(2)(b)(xv) of the Rome Statute prohibits “compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war”.<sup>940</sup> The focus of this war crime is centred around the forced breach of loyalty in fighting one’s own country (whether or not as part of military forces).<sup>941</sup>

While Article 438(1) of the Criminal Code of Ukraine (“CCU”) does not refer to compelling participation in military operations as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international instruments” as set out under Article 438(1). This conduct amounts to a grave violation of IHL, derived from and prohibited by Articles 23(h) and 52 of the Hague Regulations,<sup>942</sup> Article 130 of the Third Geneva Convention,<sup>943</sup> and Articles 51 and 147 of the Fourth Geneva Convention.<sup>944</sup> As Ukraine is a party to these conventions, this conduct can be charged as compelling a person to serve in the forces of a hostile power under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime prohibiting compelling prisoners of war (‘POWs’) and citizens of the opposite party to the conflict to take part in the armed forces of the opposite party to the conflict under Articles 438.1(2) and 438.1(3) of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of compelling participation in military operations contained in the ICC Rome Statute and the ICC Elements of Crimes.

The elements of this crime are:<sup>945</sup>

1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person’s own country or forces.
2. Such person or persons were nationals of a hostile party
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

<sup>940</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(xv). The Rome Statute also criminalises “compelling service in hostile forces” in an international armed conflict as a war crime under Article 8(2)(a)(v). The war crime of compelling participation in military operations is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 2(e); Law 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, Official Gazette No. 27 (31 August 2015) (‘KSC & SPO Statute’), Article 14(1)(b)(xv); ILC ‘Report of the International Law Commission on its 8th Session’ (1996) Vol. II(2) UN GAOR 51st Session UN Doc A/51/10, Article 20(a)(v).

<sup>941</sup> ICC Elements of Crimes, Article 8(2)(b)(xv), element 1.

<sup>942</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (‘Hague Regulations’), Articles 45, 46.

<sup>943</sup> Third Geneva Convention, Article 130.

<sup>944</sup> Fourth Geneva Convention, Articles 51, 147.

<sup>945</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(xv).

### **3.2.37.1 Element One: The Perpetrator Coerced One or More Persons by Act or Threat to Take Part in Military Operations Against that Person's Own Country or Forces**

#### **3.2.37.1.1 *Coerced One or More Persons by Act or Threat***

Practitioners should first seek information indicating that the perpetrator coerced or forced one or more persons “by act or threat” to participate in military operations against that person’s own country or forces. Thus, it is not illegal to recruit POWs who volunteer to fight against their own country. Instead, it must be shown that pressure or coercion to compel such persons to enter into the armed services was exerted by the perpetrator.<sup>946</sup>

#### **3.2.37.1.2 *Military Operations Against that Person's Own Country or Forces***

Second, it must be established that the military operations were directed against the country to which the compelled persons belong.<sup>947</sup> At a minimum, this would cover any armed hostilities, at least insofar as they are directed against the compelled person’s own country.<sup>948</sup> For example, forcing someone to shoot combatants of their own country, or to load a rocket to be propelled against troops of their country, would be covered by this element.<sup>949</sup>

The following activities, directly connected to the operations of war, are further prohibited:

- (i) employing deportees in armament production;<sup>950</sup>
- (ii) employing prisoners of war (‘POWs’) in the building of ammunition dumps or depots;<sup>951</sup>
- (iii) involving POWs in the manufacture and transportation of arms and munitions;<sup>952</sup> and
- (iv) forcing local residents to relay an “early warning” to a wanted person in a place besieged by the army.<sup>953</sup>

### **3.2.37.2 Element Two: Such Person or Persons Were Nationals of a Hostile Party**

Practitioners should also seek to establish that the person(s) compelled to participate in military operations were “nationals of a hostile party” (i.e., that they belonged to the hostile nation or army), which includes both combatants and civilians.<sup>954</sup>

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<sup>946</sup> *The United States of America v. Ernst von Weizsäcker et al.* (The Ministries Trial) US Military Tribunal Nuremberg, Judgement of 11 April 1949, in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. XIV, p. 549.

<sup>947</sup> See M.B. Taylor, *War Economies and International Law: Regulating the Economic Activities of Violent Conflict* (CUP 2021) p. 143.

<sup>948</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (‘Triffterer & Ambos, Commentary’), p. 449.

<sup>949</sup> Triffterer & Ambos, *Commentary*, p. 449.

<sup>950</sup> *The United States v. Alfred Krupp et al.* (The Krupp Trial) US Military Tribunal Nuremberg, Judgement of 31 July 1948, in *Law Reports of Trials of War Criminals*, Vol. X, p. 93.

<sup>951</sup> *The Netherlands v. Tanabe Koshiro* (The Koshiro Trial) Netherlands Temporary Court-Martial at Macassar, Judgement of 5 February 1947, in *Law Reports of Trials of War Criminals*, Vol. XI, p. 2.

<sup>952</sup> *The United States v. Ernhard Milch* (The Milch Trial) US Military Tribunal Nuremberg, Judgement of 16 April 1947, in *Law Reports of Trials of War Criminals*, Vol. VII, pp. 28, 43.

<sup>953</sup> *Adalah et al. v. GOC Central Command, IDF et al.*, HCJ 3799/02, Judgment of 6 October 2005, para. 22.

<sup>954</sup> Triffterer & Ambos, *Commentary*, p. 432.



### 3.2.37.3 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator coerced one or more persons by act or threat to take part in military operations against that person's own country or forces?</b>	<ul style="list-style-type: none"> <li>To which party to the conflict was the victim aligned?</li> <li>Did the perpetrator(s) coerce/force one or more persons by act or threat to take part in the military operations against their own country or forces?</li> <li>Was the victim coerced/forced into activities directly linked to military operations against that person's own country or forces?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that they were coerced into taking part in military service against their own country.</li> <li>A video captured on a mobile phone of the perpetrators forcing a civilian to shoot combatants of his own country.</li> <li>A photograph showing civilians or POWs involved in the manufacture and transportation of arms.</li> <li>A UN report indicating that a number of POWs were forcefully engaged in military activities against their own State.</li> </ul>
<b>Does the evidence show that such person or persons were nationals of a hostile party?</b>	<ul style="list-style-type: none"> <li>Was the perpetrator's conduct directed towards a national(s) of a hostile party?</li> </ul>	<ul style="list-style-type: none"> <li>A video showing POWs wearing their own uniform before being forced by soldiers of the hostile party to wear military uniform of the hostile party.</li> <li>A victim testifying that they were a Ukrainian national and they were forced by Russian soldiers to take part in military operations against Ukraine.</li> <li>Witness testimony about the forced conscription of Ukrainian men by Russian forces that took place in occupied territories, including Crimea, Donetsk, Kherson and Zaporizka.</li> <li>A report of an international organisation describing the practice by Russia of forcing Ukrainian nationals located in towns they took over to take part in military operations.</li> <li>A military order directing soldiers to forcibly recruit local villagers in recently occupied Ukrainian territory to participate in military operations.</li> </ul>

Table 45: Article 8(2)(b)(xv) Cues for Practitioners

### 3.2.38 War Crime of Pillaging a Town or Place, Even When Taken by Assault (Article 8(2)(b)(xvi), Rome Statute)

Article 8(2)(b)(xvi) of the Rome Statute prohibits pillaging a town or place, even when taken by assault,<sup>955</sup> which will occur when certain property is appropriated during an international armed conflict.

Article 438(1) of the Criminal Code of Ukraine ('CCU') explicitly refers to "pillage of national treasures on occupied territories". As such, this conduct can be charged under Article 438(1). However, in relation to pillage that does not occur on occupied territory, pillage of a town or place as a war crime is also covered by "other violations of rules of the warfare stipulated by international treaties" as set out under Article 438(1). According to Article 33 of the Fourth Geneva Convention, "[p]illage is prohibited". As Ukraine is a party to the Fourth Geneva Convention, this conduct can be charged as pillage under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of prohibited seizure of property, if not justified by military necessity, under Article 438-1.1 of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the war crime of pillaging contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>956</sup>

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.<sup>957</sup>
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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<sup>955</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), 8(2)(b)(xvi). The Rome Statute also criminalises pillaging as a war crime in non-international armed conflicts under Article 8(2)(e)(v). The war crime of pillaging is also prohibited in the following international legal instruments: *Lieber Code of 1863*, Article 44; *Hague Regulations of 1907*, Article 28; UN, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) UNTS 280 p. 1951 ('Nuremberg Charter'), Article 6(b); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 3(e)(e); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 4(f); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 3(f); *Fourth Geneva Convention*, Article 33; *Additional Protocol II*, Article 4(2)(g). Additionally, the war crime of pillaging is customary in nature: ICRC, Customary IHL Database, Rule 52. Pillage.

<sup>956</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xvi).

<sup>957</sup> As indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging.

### 3.2.38.1 Element One: The Perpetrator Appropriated Certain Property

First, practitioners should seek information showing that certain property was appropriated. Appropriation means that the control of the property in question was transferred from the owner to the perpetrator.<sup>958</sup> This provision does not prohibit mere sporadic acts that violate property rights, but rather prohibits the appropriation of property on a large scale.<sup>959</sup>

### 3.2.38.2 Element Two: The Perpetrator Intended to Deprive the Owner of the Property and to appropriate it For Private or Personal Use

Second, practitioners must establish that the perpetrator appropriated the relevant property for private or personal use.<sup>960</sup> Appropriation of property justified by military necessity will not suffice.<sup>961</sup> Military necessity is defined as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.<sup>962</sup> See Section 3.2.19.2 for further discussion of military necessity.

### 3.2.38.3 Element Three: The Appropriation was Without the Consent of the Owner

Third, to satisfy this element, practitioners should seek information showing that the property was appropriated against the will of the owner, including through violence and threats.<sup>963</sup> Indication of coercion, threats, intimidation or pressure is indicative of lack of consent and will, in any event, vitiate the consent of the owner.<sup>964</sup> Lack of consent can also be inferred from the circumstances of the case, for example, if the owner is absent from the place from where the property was taken it can be inferred that they did not consent to the appropriation.<sup>965</sup> That said, the appropriation does not have to be carried out through violent means.<sup>966</sup>

### 3.2.38.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (see Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the</b>	<ul style="list-style-type: none"><li>What was the scale of the appropriation?</li></ul>	<ul style="list-style-type: none"><li>A witness testifying that the perpetrators pillaged many items of</li></ul>

<sup>958</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 (*Bemba Trial Judgment*), para. 115.

<sup>959</sup> *Bemba Trial Judgment*, para. 117.

<sup>960</sup> It should be noted that the requirement of this war crime that the appropriation of property be for private or personal use is particular to the ICC (i.e., not part of customary or conventional international humanitarian law) (*Bemba Trial Judgment*, para. 120). Other tribunals have found this to be unduly restrictive to be an element of the crime of pillage (*Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007 (*Brima et al. Trial Judgment*), para. 754). Therefore, in domestic investigations and prosecutions, proving this element may not be strictly necessary to establish the crime of pillaging.

<sup>961</sup> ICC Elements of Crimes, Article 8(2)(b)(xvi), fn. 47; *Bemba Trial Judgment*, para.125, fn. 295.

<sup>962</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014, para. 894; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 686. See also, Lieber Code of 1863, Article 14.

<sup>963</sup> *Brima et al. Trial Judgment*, paras 398, 1410-1415, 1418-1429.

<sup>964</sup> *Bemba Trial Judgment*, para. 116; *The IG Farben Case*, Case 6, Decision and Judgment of the United States Military Tribunal VI at Nuremberg, 30 July 1948, pp. 1135–1136.

<sup>965</sup> *Bemba Trial Judgment*, para. 116.

<sup>966</sup> *Bemba Trial Judgment*, para. 116; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, para. 591.

<p><b>perpetrator appropriated certain property?</b></p>	<ul style="list-style-type: none"> <li>• How many people were affected by the appropriation?</li> <li>• What is the monetary value of the appropriated property?</li> <li>• What were the effects of the appropriation on the victim(s)?</li> </ul>	<p>significant value, such as vehicles, but also minor items such as foodstuffs.</p> <ul style="list-style-type: none"> <li>• Reports of the military police indicating that a large-scale expulsion of civilians from their homes took place and that their apartments were robbed by the perpetrators.</li> <li>• Reports of international observers establishing that the plunder was large-scale, extensive and repeated in nature.</li> <li>• A report indicating that Russian military forces and civilians operating under their orders pillaged thousands of valuable artifacts and artworks from two museums, a cathedral, and a national archive in Kherson.</li> </ul>
<p><b>Does the evidence show that the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use?</b></p>	<ul style="list-style-type: none"> <li>• Under what circumstances was the relevant property appropriated?</li> <li>• What was the purpose of the appropriated property?</li> <li>• Could the appropriated property be used in military operations?</li> <li>• Were there any grounds to justify the appropriation on military grounds?</li> <li>• Is there any information regarding the circumstances of the appropriation that enable an inference that the appropriation was not justified by military necessity?</li> <li>• How was the appropriated property used by the perpetrator after the appropriation? Was it used for a military purpose?</li> <li>• Was the property used as payment for the combatants?</li> <li>• Was the appropriated property used for personal/private purposes by the perpetrator?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness statements establishing that the looted property was seen as self-compensation in the absence of adequate payment and rations to the members of the armed group.</li> <li>• Reports by governmental and military authorities indicating that cases of illegal appropriation of property and plunder took place.</li> <li>• A photo showing the perpetrators gifting their relatives the stolen goods.</li> <li>• A media report establishing that the perpetrators transported and sold the appropriated goods.</li> <li>• Intercepted phone calls between the perpetrator and their family back home informing them that they have sent them TVs and other items they took from the houses located in a town their unit is occupying.</li> <li>• Video footage of soldiers sending home parcels alleged to contain the looted property of civilians.</li> </ul>
<p><b>Does the evidence show that the appropriation was without the consent of the owner?</b></p>	<ul style="list-style-type: none"> <li>• Who owned the appropriated property?</li> <li>• Can it reasonably be inferred that the property belonged to the victim?</li> <li>• Was there any commercial contract or other document signifying the ownership of the victim over the appropriated property?</li> <li>• Was the property owned by the State? Is there any national legislation or official documents that prove the</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that she was physically restrained during the appropriation of her property.</li> <li>• The deed to a building that was appropriated.</li> <li>• Witness testimony of local residents that they saw Russian soldiers who were occupying their town stealing food and alcohol, personal belongings, valuables, computers and household items, such</li> </ul>

	<p>State's ownership of the property or resources?</p> <ul style="list-style-type: none"> <li>• Did the victim provide explicit consent without any coercion for the appropriation of their property?</li> <li>• Do the circumstances of the appropriation lead to an inference of lack of consent of the victim?</li> <li>• Was the victim present in the area when the appropriation took place?</li> <li>• Was the victim threatened or coerced during the appropriation of their property?</li> </ul>	<p>as washing machines and microwaves, from stores and houses.</p> <ul style="list-style-type: none"> <li>• Aerial photos of burning civilian houses and stables, which were torched by the military after plunder.</li> <li>• A survey by Human Rights Watch providing information on the ownership of the appropriated property.</li> <li>• Intercepted phone calls between the perpetrator and their family back home informing them that they took TVs and other items from the houses located in a town their unit is occupying.</li> </ul>
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Table 46: Article 8(2)(b)(xvi) Cues for Practitioners

### 3.2.39 War Crime of Employing Prohibited Bullets (Article 8(2)(b)(xix), Rome Statute)

Article 8(2)(b)(xix) of the Rome Statute prohibits the war crime of employing prohibited bullets,<sup>967</sup> which will occur when a perpetrator uses bullets which expand or flatten easily in the human body.

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to employing prohibited bullets as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international instruments" as set out under Article 438(1). This conduct is prohibited under customary IHL,<sup>968</sup> and is codified in the 1899 Hague Declaration (Declaration 3) Concerning Expanding Bullets, which provides that "[t]he Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions".<sup>969</sup> As Ukraine is a party to this instrument and is bound by customary IHL, this conduct can be charged as using bullets which expand or flatten easily in the human body under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of employing prohibited bullets under Article 438-3.1 of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of employing prohibited bullets contained in the ICC Rome Statute and Elements of Crimes.

The elements of this crime are:<sup>970</sup>

1. The perpetrator employed certain bullets.
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

<sup>967</sup> Rome Statute, Article 8(2)(b)(xix).

<sup>968</sup> See, O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) ('Triffterer & Ambos, *Commentary*'), p. 465; ICRC, Customary IHL Database, Rule 77. Expanding Bullets and Rule 78. Exploding Bullets.

<sup>969</sup> Declaration IV,3 concerning Expanding Bullets. The Hague 29 July 1899.

<sup>970</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xix).

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### **3.2.39.1 Element One: The Perpetrator Employed Certain Bullets**

To establish this element, practitioners need to assess the type of bullets that were used by the perpetrator.

### **3.2.39.2 Element Two: The Bullets Were Such That Their Use Violates the International Law of Armed Conflict Because They Expand or Flatten Easily in the Human Body**

To satisfy this element, the practitioners must determine whether the bullets present at the scene have certain features, the effect of which on the human body would be to “cause significantly more serious injury than an equivalent standard bullet would, injury which often is particularly difficult to treat and may be unnecessary to arrive at legitimate military aims” (i.e., to uselessly aggravate suffering or the wounding effect).<sup>971</sup>

There are a wide range of bullets that violate international humanitarian law (‘IHL’), including: bullets not completely surrounded by hard casing; bullets notched with incisions; bullets that explode on impact with the human body; shotguns; projectiles that burst or deform in the human body; projectiles that start to tumble in the human body; and projectiles that cause extensive tissue damage or lethal shock.<sup>972</sup>

### **3.2.39.3 Element Three: The Perpetrator was Aware that the Nature of the Bullets was Such that their Employment Would Uselessly Aggravate Suffering or the Wounding Effect**

To establish this element, practitioners need to determine if the perpetrator was aware that they used a bullet that would uselessly aggravate suffering or the wounding effect. As individual soldiers may not be aware of the scientific effect a bullet they use may have on the human body (i.e., that they expand or flatten easily in the human body), this element balances what an individual soldier can be expected to know about specific bullets and their damaging effects.<sup>973</sup> The perpetrator must have been aware that the nature of the bullets they used would uselessly exacerbate the suffering of, or the wounding effect on, the victim.<sup>974</sup> The perpetrator is not required to have knowledge pertaining

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<sup>971</sup> Triffterer & Ambos, *Commentary*, p. 465.

<sup>972</sup> See e.g., Triffterer & Ambos, *Commentary*, pp. 465-466 (citing *Law of Armed Conflict, [German Military] Manual*, Joint Service Regulation 15/2, May 2013, DSK V230100262, marginal no. 440; Memorandum for US Army Armament Research, Development and Engineering Center (19 Feb. 1998)); ICRC, Customary IHL Database, Rule 77. *Expanding Bullets* and Rule 78. *Exploding Bullets*; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2009), p. 296; D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 1999), p. 122.

<sup>973</sup> Triffterer & Ambos, *Commentary*, p. 466.

<sup>974</sup> Triffterer & Ambos, *Commentary*, p. 467.



to the illegality of the bullets, only to the nature of their wounding effect.<sup>975</sup> Thus, it must be evident that the person firing the weapon was aware that the bullet would cause particularly grave injuries.<sup>976</sup>

### 3.2.39.4 General Contextual and Mental Elements

Finally, practitioners should also seek information establishing the general contextual elements common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator used certain bullets?</b>	<ul style="list-style-type: none"> <li>• Did any bullets found at the scene appear to have been the type to uselessly aggravate suffering or the wounding effect?</li> <li>• Did the perpetrator use these bullets?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they saw a soldier make incisions in a bullet before using it in battle.</li> <li>• A video posted on social media depicting the firing and effect of the bullets.</li> <li>• A photograph of the bullet.</li> <li>• An autopsy report indicating that bullets with incisions on them were extracted from the victim's body.</li> <li>• Official military documents indicating that prohibited bullets were in the perpetrator's possession.</li> <li>• Weapons analysis showing that certain bullets were used by the perpetrator.</li> <li>• Bullet casings collected from the crime scene.</li> </ul>
<b>Does the evidence show that the bullets used violated IHL because they expand or flatten easily in the human body?</b>	<ul style="list-style-type: none"> <li>• Was the bullet not completely surrounded by a hard casing?</li> <li>• Was the bullet notched with incisions?</li> <li>• Did the bullet explode on impact?</li> <li>• Was a shotgun used?</li> <li>• Did the bullet or projectile burst or deform the victim's body?</li> <li>• Did the bullet or projectile tumble in the victim's body?</li> </ul>	<ul style="list-style-type: none"> <li>• Forensic autopsies establishing that the cause of death of the victim(s) was a result of a projectile bursting in the body.</li> <li>• A witness testifying to the severe effect the bullet had on the victim's body.</li> <li>• A video depicting the effect the bullet had on the victim.</li> <li>• Bullets collected from the crime scene showing they were notched with incisions.</li> </ul>
<b>Does the evidence show that the perpetrator was aware that the nature of the bullets was such that their employment</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator know about the effects of the bullet's impact?</li> <li>• Does anything in the circumstances surrounding the bullets use indicate that the perpetrator was aware that the bullet would cause particularly grave injuries to the victim?</li> <li>• Is there any evidence to indicate that the perpetrator has used such bullets</li> </ul>	<ul style="list-style-type: none"> <li>• Official military documents indicating that prohibited bullets were in the perpetrator's possession.</li> <li>• A witness testifying that they often saw the perpetrator use a shotgun.</li> <li>• A witness testifying that they saw a soldier make incisions in a bullet before using it in battle.</li> </ul>

<sup>975</sup> C. Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press 2009), p. 135.

<sup>976</sup> Triffterer & Ambos, *Commentary*, p. 466.

<b>would uselessly aggravate suffering or the wounding effect?</b>	before and would therefore be aware of the grave effect they have on the victim?	<ul style="list-style-type: none"> <li>• A video of the perpetrator loading a weapon with prohibited bullets.</li> <li>• A weapons order including prohibited bullets signed by the perpetrator.</li> </ul>
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Table 47: Article 8(2)(b)(xix) Cues for Practitioners

### 3.2.40 War Crime of Outrages upon Personal Dignity (Article 8(2)(b)(xxi), Rome Statute)

Article 8(2)(b)(xxi) prohibits “[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment”.<sup>977</sup>

While Article 438(1) of the Criminal Code of Ukraine (‘CCU’) does not refer to outrages upon personal dignity as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international instruments” as set out under Article 438(1). This conduct amounts to a serious violation of Article 75(2)(b) of Additional Protocol I, which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment [...]”, and such outrages are determined by the overriding principle of humane treatment as articulated in Article 27 of the Fourth Geneva Convention.<sup>978</sup> As Ukraine is a party to Additional Protocol I and the Fourth Geneva Convention, this conduct can be charged as outrages upon personal dignity under Article 438(1) of the CCU.

Additionally, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime prohibiting acts infringing on human dignity under Article 438.2(5) of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of outrages upon personal dignity contained in the ICC Rome Statute and the ICC Elements of Crimes.

The elements of this crime are:<sup>979</sup>

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.

<sup>977</sup> Rome Statute, Article 8(2)(b)(xxi). The war crime of outrages upon personal dignity is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 3; UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 4(e); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 3(e); Law 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, Official Gazette No. 27 (31 August 2015) (‘KSC & SPO Statute’), Article 14(1)(b)(xxi). Additionally, the war crime of outrages upon personal dignity is customary in nature: ICRC, Customary IHL Database, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment.

<sup>978</sup> Additional Protocol I, Article 75(2)(b); Fourth Geneva Convention, Article 27. See also, ICRC, Customary IHL Database, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment; J. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary: IV Geneva Convention* (ICRC 1958), p. 201.

<sup>979</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(xxi).

3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

### **3.2.40.1 Element One: The Perpetrator Humiliated, Degraded or Otherwise Violated the Dignity of One or More Persons**

Practitioners should first establish that the perpetrators humiliated, degraded or otherwise violated the dignity of one or more person(s). For this crime “persons” can include dead persons,<sup>980</sup> and the treatment or other forms of outrage may be perpetrated through acts, omissions or statements.<sup>981</sup>

Acts such as forced incest, burying corpses in latrine pits, leaving infants without care after killing their guardians, forced penetration of the mouth by the male sexual organ and removing foetuses from the womb have been considered acts constituting outrages upon personal dignity.<sup>982</sup>

This element also requires the victim(s) of the humiliation, degradation or other violation of their dignity to be individuals: (i) whose allegiance is to a party to the conflict that is adverse or hostile to that of the perpetrator; and (ii) who find themselves in the hands of the party to the conflict to which the perpetrator belongs.<sup>983</sup>

### **3.2.40.2 Element Two: The Severity of Humiliation, Degradation or Other Violation Was of Such Degree as to be Generally Recognised as an Outrage upon Personal Dignity**

The act or omission of the perpetrator needs to be committed with objectively sufficient gravity so as to be generally recognised as an outrage upon personal dignity.<sup>984</sup> As long as the humiliation and degradation is real, there is no need for the conduct of the perpetrator to cause direct and lasting harm to the physical or mental well-being of the victim.<sup>985</sup>

The severity assessment should take into account relevant factors such as the culture or religion of the victims,<sup>986</sup> especially when they are forced into an activity that is forbidden by their religion, such as cutting off the hair and beards of Indian Sikh prisoners of war and forcing them to smoke cigarettes.<sup>987</sup> Practitioners should also consider the personal characteristics of the victims, including their age, character, temperament or psychological resilience. For example, the same act committed by a perpetrator may cause “intense suffering” to a psychologically sensitive individual but

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<sup>980</sup> ICC Elements of Crimes, fn. 49.

<sup>981</sup> *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001 (*Kvočka et al. Trial Judgment*) para. 172.

<sup>982</sup> *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998 (*Furundžija Trial Judgment*), para. 183.

<sup>983</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 (*Katanga Decision on the Confirmation of Charges*), para. 368.

<sup>984</sup> *Katanga Decision on the Confirmation of Charges*, para. 369.

<sup>985</sup> *Prosecutor v. Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2002 (*Kunarac et al. Trial Judgment*), para. 503; *Katanga Decision on the Confirmation of Charges*, para. 369; *Sesay et al. Trial Judgment*, para. 176; *Ongwen Trial Judgement*, para. 2756.

<sup>986</sup> ICC Elements of Crimes, fn. 49.

<sup>987</sup> *Australia v. Chuichi* (Trial of Tanaka Chuichi and Two Others), Australian Military Court at Rabaul, Judgment, 12 July 1946, p. 62.

“inconsequential discomfort” to individuals with nonchalant dispositions.<sup>988</sup> Acts committed in public may also aggravate their severity.<sup>989</sup>

The following are examples of violations of dignity that have been recognised to have reached a level of severity so as to be generally considered an outrage upon personal dignity:

- (i) forcing an abductee to kill another abductee with a club and to inspect corpses;<sup>990</sup>
- (ii) forcing mothers to abandon their children on the side of the road;<sup>991</sup>
- (iii) forcing someone to beat a person to death;<sup>992</sup>
- (iv) forcing a father and son to physically beat each other;<sup>993</sup>
- (v) leading detainees to plead for mercy so as not to be stunned by an electric cattle prod;<sup>994</sup>
- (vi) forcing brothers to perform oral sex on each other in front of other prisoners;<sup>995</sup>
- (vii) hanging female prisoners naked from handcuffs or forcing them to maintain a certain position for long periods of time;<sup>996</sup>
- (viii) using detainees as human shields or trench-diggers;<sup>997</sup>
- (ix) forcing detainees to relieve bodily functions in their clothing and imposing conditions of constant fear of being subjected to physical, mental or sexual violence on detainees;<sup>998</sup> and
- (x) beating and forcing detainees to dance naked.<sup>999</sup>

### 3.2.40.3 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons?</b>	<ul style="list-style-type: none"> <li>Who is the victim?</li> <li>Which party to the conflict is the victim aligned to? Was the person in the hands of the party to the conflict to which the person belongs?</li> <li>What were the acts that perpetrator committed that could be considered humiliating, degrading or otherwise violating their personal dignity?</li> <li>Were the victims forced to perform acts that could be considered</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that two brothers were forced to perform oral sex on each other.</li> <li>A victim (a 22-year-old woman) testifying that two Russian soldiers entered her home, raped her several times, committed acts of sexual violence on her husband and forced the couple to have sexual intercourse in their presence. Then they were forced to watch as one of the soldiers forced</li> </ul>

<sup>988</sup> *Prosecutor v. Aleksovski*, IT-95-14/1-T, Trial Judgment, 25 June 1999 (*Aleksovski Trial Judgment*), para. 56.

<sup>989</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Judgment, 18 May 2012, para. 1196.

<sup>990</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (*Ongwen Trial Judgment*), para. 2903.

<sup>991</sup> *Ongwen Trial Judgment*, para. 2903.

<sup>992</sup> *Ongwen Trial Judgment*, para. 3065.

<sup>993</sup> *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 (*Delalić et al. Trial Judgment*), paras 1067–1070.

<sup>994</sup> *Delalić et al. Trial Judgment*, paras 1052–1059.

<sup>995</sup> *Delalić et al. Trial Judgment*, paras 1062–1066.

<sup>996</sup> *Katanga Decision on the Confirmation of Charges*, para. 370.

<sup>997</sup> *Aleksovski Trial Judgment*, para. 229.

<sup>998</sup> *Kvočka et al. Trial Judgment*, para. 173.

<sup>999</sup> *Kunarac et al. Trial Judgment*, para. 157.

	humiliating, degrading or otherwise violating their personal dignity?	<p>their 4-year-old daughter to perform oral sex on him.</p> <ul style="list-style-type: none"> <li>• Psychology reports issued by qualified practitioners describing the humiliation suffered by the victim as a result of their treatment by the perpetrator.</li> <li>• The objects or instruments used to humiliate the victim, such as a baseball bat or the rope used to tie them up.</li> <li>• A video of women being forced to remove their clothing and stand naked in front of the soldiers present in the interrogation room.</li> <li>• A report by International Federation for Human Rights used to prove that dead bodies were dumped in latrines.</li> <li>• A UN report indicating that the Russian armed forces detained a priest, undressed him fully, beat him, and ordered him to parade naked for one hour in the streets of his village.</li> </ul>
<b>Does the evidence show that the severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity?</b>	<ul style="list-style-type: none"> <li>• Was the conduct of the perpetrator towards the victim severe enough to be objectively considered as humiliating, degrading or otherwise in violation of the personal dignity of the victim?</li> <li>• Would a reasonable person have perceived the conduct of the perpetrator as humiliating, degrading or otherwise in violation of the personal dignity of the victim?</li> <li>• Does the cultural background of the victim contribute to the severity of the perpetrator's conduct?</li> <li>• Did the victim suffer any lasting physical or mental harm?</li> </ul>	<ul style="list-style-type: none"> <li>• Testimonial evidence that the victim, who was 12 at the time, was traumatised by having to watch his parent being beaten.</li> <li>• Victim testimony that not only was it traumatising to be raped by the perpetrator, but that trauma was compounded by the fact that her mother and father were forced to watch it happen.</li> <li>• Medical evidence describing that a victim suffered mental health concerns as a result of their humiliation.</li> <li>• Victim testimony that throughout their detention by the Russian armed forces, during which they were subjected to continuous torture, they felt as if their "body shut down and switched to a survival mode".</li> <li>• A UN report indicated that, in relation to individuals who were confined by the Russian armed forces in a school basement for 28 days, the soldiers degraded and violated the detainees dignity by placing them in inhumane detention conditions (e.g., they provided limited access to food and water, the detainees had to ask permission to use the toilet, and the</li> </ul>

		soldiers randomly shot near the detainees to scare them).
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Table 48: Article 8(2)(b)(xxi) Cues for Practitioners

### 3.2.41 War Crime of Rape (Article 8(2)(b)(xxii)-1, Rome Statute)

Article 8(2)(b)(xxii) of the Rome Statute prohibits the war crime of rape when committed in the context of an international armed conflict.<sup>1000</sup>

While Article 438(1) of the Criminal Code of Ukraine (‘CCU’) does not refer to rape as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international instruments” as set out under Article 438(1). This conduct is prohibited by Article 27 of the Fourth Geneva Convention, which provides that protected persons are “protected against any attack on their honour, in particular against rape [...]”.<sup>1001</sup> In addition, rape is also prohibited in international armed conflicts under Articles 75(2)(b), 76(1) and 77(1) of Additional Protocol I. As Ukraine is a party to the Fourth Geneva Convention and Additional Protocol I, this conduct can be charged as rape under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of rape under Article 438.2(8) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the war crime of rape contained in the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>1002</sup>

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

<sup>1000</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(xxii). The Rome Statute also criminalises rape as a war crime in non-international armed conflicts under Article 8(2)(e)(vi) and as a crime against humanity under Article 7(1)(g). The war crime of rape is also prohibited in the following international legal instruments: UN Security Council, Resolution 827; UN Security Council, Resolution 955; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 4(e); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 3(e). Additionally, the prohibition of rape is customary in nature: ICRC, Customary IHL Database, Rule 93. Rape and Other forms of Sexual Violence.

<sup>1001</sup> Fourth Geneva Convention, Article 27.

<sup>1002</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(xxii)-1.



Elements One and Two of the war crime of rape are the same as Elements One and Two of the crime against humanity of rape under Article 7(1)(g)-1, discussed in detail above (*see* Section 3.2.7).

### 3.2.41.1 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body?</b>	<ul style="list-style-type: none"> <li>Was there penetration of any part of the body of the victim or perpetrator with a sexual organ?</li> <li>Was there penetration of the anal or genital opening of the victim with any object or any other part of the body?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that three of her attackers in turn penetrated her vagina with their penises and hands.</li> <li>A victim testifying that a Russian soldier held her at gunpoint and made her perform oral sex on him and then raped her.</li> <li>Medical examination reports indicating that the anal opening of the victim had been penetrated.</li> <li>Forensic evidence such as swabs, samples and DNA test results indicating that the victim's vagina had been penetrated with a sexual organ.</li> <li>Video footage captured on a mobile phone of the perpetrators inserting their penises into the mouth of the male victim.</li> <li>A UN report indicating that two Russian soldiers entered a home, raped a 22-year-old woman several times, committed acts of sexual violence on her husband and forced the couple to have sexual intercourse in their presence. Then one of the soldiers forced their 4-year-old daughter to perform oral sex on him.</li> </ul>
<b>Did the perpetrator do so:</b>	<ul style="list-style-type: none"> <li>by using force;</li> <li>by using the threat of force or coercion (e.g., fear, violence, duress, detention psychological oppression or abuse of power);</li> <li>by taking advantage of a coercive environment; or</li> <li>by taking advantage of another person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that she was abducted, threatened with death and raped repeatedly by a combatant.</li> <li>A woman from Hostomel testifying that she was taken by a Russian soldier to an apartment building where she was forced to undress and was raped.</li> <li>A witness testifying that they saw a Russian soldier wave his pistol, threaten to shoot people, and drag a woman to a room on the second floor a building where the witness later found out she had been raped.</li> </ul>

		<ul style="list-style-type: none"> <li>• Detention records demonstrating that the victims had been detained when they were raped.</li> <li>• Physical evidence of the force used during a rape such as bruises on the body of the victim or vaginal bleeding.</li> <li>• Reports by international organisations describing the coercive environment that existed prior to the commission of rapes, including the attacks and crimes committed.</li> </ul>
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Table 49: Article 8(2)(b)(xxii)-1 Cues for Practitioners

### 3.2.42 War Crime of Sexual Slavery (Article 8(2)(b)(xxii)-2, Rome Statute)

Article 8(2)(b)(xxii) of the Rome Statute prohibits the war crime of sexual slavery when committed in the context of an international armed conflict.<sup>1003</sup>

While Article 438(1) of the Criminal Code of Ukraine (‘CCU’) does not refer to sexual slavery as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international instruments” as set out under Article 438(1). This conduct is prohibited by Article 27 of the Fourth Geneva Convention, which provides that protected persons are “protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of indecent assault”.<sup>1004</sup> In addition, sexual slavery is also prohibited in international armed conflicts under Articles 75(2)(b), 76(1) and 77(1) of Additional Protocol I. As Ukraine is a party to the Fourth Geneva Convention and Additional Protocol I, this conduct can be charged as other forms of indecent assault under Article 438(1) of the CCU.

Note that Draft Bill 7290 (if, and when, it comes into force) does not include sexual slavery as one of the acts specifically criminalised as a war crime under Article 438 of the CCU.

<sup>1003</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(xxii). The Rome Statute also criminalises rape as a war crime in non-international armed conflicts under Article 8(2)(e)(vi) and as a crime against humanity under Article 7(1)(g). The war crime of rape is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 4(e); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 3(e). Additionally, the prohibition of rape is customary in nature: ICRC, Customary IHL Database, Rule 93. Rape and Other forms of Sexual Violence.

<sup>1004</sup> Fourth Geneva Convention, Article 27.

The elements of this crime are:<sup>1005</sup>

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>1006</sup>
2. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements One and Two of the war crime of sexual slavery are the same as Elements One and Two of the crime against humanity of sexual slavery under Article 7(1)(g)-2, discussed in detail above (*see* Section 3.2.8).

### 3.2.42.1 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty?</b>	<ul style="list-style-type: none"> <li>Did the perpetrator exercise any or all of the powers of ownership, such as by purchasing, selling, lending or bartering the victim(s)?</li> <li>Did the perpetrator deprive the victim of their liberty, including freedom of movement and choice?</li> <li>Did the perpetrator exact forced labour from the victim(s)?</li> <li>Did the perpetrator reduce the victim to a servile status (i.e., through debt bondage, serfdom, forced marriage, child exploitation, etc.)?</li> <li>Did the perpetrator traffic the victim(s)?</li> <li>What measures did the perpetrator put in place to deter the victim from escaping?</li> <li>Was the victim particularly vulnerable?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that soldiers occupied her home, forced her to remain and reduced her to a servile status by requiring her to perform different domestic duties such as cooking, fetching water, washing and collecting wood.</li> <li>A prisoner ledger of a detention centre with descriptions of the work performed by each detainee.</li> <li>A witness testifying that she overheard the perpetrator discussing the sale of another detainee to a fellow soldier.</li> <li>Documents indicating purchase or sale of the victim by the perpetrator.</li> <li>Chains and other bondage equipment used by the perpetrator</li> </ul>

<sup>1005</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xxii)-2.

<sup>1006</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

	<ul style="list-style-type: none"> <li>• Under what socioeconomic conditions did the perpetrator exercise the power of ownership over the victim?</li> </ul>	<ul style="list-style-type: none"> <li>• to restrict the freedom of movement of the victim.</li> <li>• Video footage of a market where victims were sold or purchased by the perpetrator in exchange for money or other goods.</li> </ul>
<p><b>Does the evidence show that the perpetrator caused one or more persons to engage in one or more acts of a sexual nature?</b></p>	<ul style="list-style-type: none"> <li>• What was the nature of the acts committed against the victim? Where, when and by whom were such acts committed?</li> <li>• Was the act in question sexual in nature?</li> <li>• Was a part of the body associated with sexuality targeted?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims testifying that after the attack on the village they were kept as the wives of soldiers, during which time they were forced to engage in acts of a sexual nature, such as penetration, with the perpetrator.</li> <li>• A diary of a soldier in which he described participating in sexual acts with the victim who he held in captivity.</li> <li>• A victim testifying that soldiers occupied her home, refused to let her leave, forced her to perform domestic tasks and raped her.</li> <li>• A report from a medical evaluation of the victim, who was held by force at a military camp for over a month, indicating she was raped.</li> <li>• NGO reports of women enslaved and forced to perform acts of a sexual nature, including vaginal and oral penetration.</li> </ul>

Table 50: Article 8(2)(b)(xxii)-2 Cues for Practitioners

### 3.2.43 War Crime of Enforced Prostitution (Article 8(2)(b)(xxii)-3, Rome Statute)

Article 8(2)(b)(xxii)-3 of the Rome Statute prohibits the war crime of enforced prostitution when committed in the context of an international armed conflict.<sup>1007</sup>

While Article 438(1) of the Criminal Code of Ukraine (“CCU”) does not refer to enforced prostitution as a war crime, this conduct is covered by “other violations of rules of the warfare stipulated by international instruments” as set out under Article 438(1). This conduct amounts to a serious violation of Article 75(2)(b)

<sup>1007</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 8(2)(b)(xxii). The Rome Statute also criminalises enforced prostitution as a war crime in non-international armed conflicts under Article 8(2)(e)(vi) and as a crime against humanity under Article 7(1)(g). The war crime of enforced prostitution is also prohibited in the following international legal instruments: UN Security Council, Resolution 827: UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 4(e); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 (‘SCSL Statute’), Article 3(e). Additionally, the prohibition of enforced prostitution is customary in nature: ICRC, Customary IHL Database, Rule 93. Rape and Other forms of Sexual Violence.

of Additional Protocol I, which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”.<sup>1008</sup> As Ukraine is a party to Additional Protocol I, this conduct can be charged as enforced prostitution under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of enforced prostitution (i.e., sexual exploitation) under Article 438.2(8) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the war crime of enforced prostitution contained in the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>1009</sup>

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements One and Two of the war crime of enforced prostitution are the same as Elements One and Two of the crime against humanity of enforced prostitution under Article 7(1)(g)-3, discussed in detail above (*see* Section 3.2.9).

### 3.2.43.1 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator committed an act of a sexual nature against one or more persons or cause such person or persons to engage in an act</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator cause the victim(s) to engage in any physical or non-physical act of a sexual nature with the perpetrator?</li> <li>• Did the perpetrator cause the victim(s) to engage in any physical or non-physical act of a sexual nature with themselves or another person?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that a soldier forced her to strip naked in front of other soldiers.</li> <li>• A website online where pictures of the victims were posted with advertisements for sexual services.</li> <li>• Police reports describing the victim being forced to masturbate in front of soldiers.</li> <li>• Video evidence recorded on a mobile phone showing women dancing naked and touching themselves.</li> </ul>

<sup>1008</sup> Additional Protocol I, Article 75(2)(b).

<sup>1009</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(xxii)-3.

<b>of a sexual nature?</b>		<ul style="list-style-type: none"> <li>• A Report of a UN Special Rapporteur describing testimonies of persons who had been forced to perform oral sex on numerous men who visited the house they were detained in.</li> </ul>
<b>Did the perpetrator do so:</b>	<ul style="list-style-type: none"> <li>• by force;</li> <li>• by threat of force or coercion (e.g., fear of violence, duress, detention psychological oppression or abuse of power);</li> <li>• by taking advantage of a coercive environment; or</li> <li>• by taking advantage of a person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that she was forced to undress by a soldier who threatened to beat her if she did not comply.</li> <li>• A video of soldiers with guns forcing women into a room where the sexual violence took place.</li> <li>• A victim testifying that she performed the sexual acts because otherwise the man detaining her would not give her food.</li> <li>• A report by a human rights organisation indicating that the victims were detained by soldiers and forced to perform sexual acts whilst detained in prison.</li> <li>• A medical examination report detailing that the victim had multiple bruises across her body and rope marks across her wrist indicating she had been restrained.</li> </ul>
<b>Does the evidence show that a monetary or other form of payment or advantage was obtained or expected in exchange for or in connection with the act(s) of a sexual nature?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator or another person benefit (or expect to benefit) financially in exchange for or in connection with the acts of a sexual nature?</li> <li>• Did the perpetrator or another person benefit (or expect to benefit) materially or to obtain another advantage in exchange for or in connection with the acts of a sexual nature?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims testifying that they were required to collect money from each man brought to them and that they had to earn a certain amount of money per evening through their sexual acts.</li> <li>• Bank transfers between the perpetrator and the 'client' who had sex with the victim.</li> <li>• Photographs of a car that was allegedly gifted to the perpetrator in exchange for the perpetrator's act of bringing girls to a third person for sexual acts.</li> <li>• Reports of NGOs describing a system whereby the perpetrators received money or favours from individuals (i.e., the 'clients') in exchange for acts of a sexual nature by the victim.</li> </ul>

Table 51: Article 8(2)(b)(xxii)-3 Cues for Practitioners



### 3.2.44 War Crime of Forced Pregnancy (Article 8(2)(b)(xxii)-4, Rome Statute)

Article 8(2)(b)(xxii) of the Rome Statute prohibits the war crime of forced pregnancy when committed in the context of an international armed conflict.<sup>1010</sup>

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to forced pregnancy as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international instruments" as set out under Article 438(1). Article 27 of the Fourth Geneva Convention protects women against "rape, enforced prostitution or any other form of indecent assault" which encompasses all forms of sexual violence, including enforced pregnancy.<sup>1011</sup> In addition, Article 76(1) of Additional Protocol I protects women against "rape, forced prostitution and any other form of indecent assault".<sup>1012</sup> As Ukraine is a party to the Fourth Geneva Convention and Additional Protocol I, this conduct can be charged as other forms of indecent assault under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of forced pregnancy under Article 438.2(8) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the war crime of forced pregnancy contained in the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>1013</sup>

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Element One of the war crime of forced pregnancy is the same as Element One of the crime against humanity of forced pregnancy under Article 7(1)(g)-4, discussed in detail above (*see* Section 3.2.10).

#### 3.2.44.1 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show</b>	<ul style="list-style-type: none"><li>• Was the victim deprived of her physical liberty?</li></ul>	<ul style="list-style-type: none"><li>• A victim testifying that she was 'distributed' to the perpetrator's home</li></ul>

<sup>1010</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(xxii). The Rome Statute also criminalises forced pregnancy as a war crime in non-international armed conflicts under Article 8(2)(e)(vi) and as a crime against humanity under Article 7(1)(g). The prohibition of forced pregnancy is customary in nature: ICRC, Customary IHL Database, Rule 93. Rape and Other forms of Sexual Violence.

<sup>1011</sup> Fourth Geneva Convention, Article 27.

<sup>1012</sup> Additional Protocol I, Article 76(1).

<sup>1013</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xxii)-4.

<p><b>that the perpetrator confined one or more women forcibly made pregnant?</b></p>	<ul style="list-style-type: none"> <li>• Was the confinement unlawful?</li> <li>• Was the victim pregnant at any time during her confinement?</li> <li>• Was her pregnancy forced, i.e., did it involve the use of force, including violence or other coercion or threat of force?</li> </ul>	<p>during her pregnancy where she was placed under heavy guard and told that if she tried to escape, she would be killed.</p> <ul style="list-style-type: none"> <li>• Evidence collected during the physical examination of the victim, who had been confined to the perpetrator's home, indicating that she had been repeatedly raped and impregnated.</li> <li>• Photographs of the pregnant victim pictured with the suspect at his home, which was under armed guard.</li> <li>• A UN Special Rapporteur Report establishing that when the women interviewed were forcibly made pregnant, they were told by the perpetrators that they were to be confined until they were six months pregnant.</li> </ul>
<p><b>Does the evidence show that the perpetrator confined the forcibly impregnated woman with the intent of affecting the ethnic composition of any population <u>or</u> carrying out other grave violations of international law?</b></p>	<ul style="list-style-type: none"> <li>• Was the ethnic identity of the perpetrator and the victim different? Was the perpetrator aware of this difference?</li> <li>• Did the perpetrator ever acknowledge by words or actions their intent to affect the ethnic composition of the population in confining the victim(s)?</li> <li>• Did the ethnic composition of the population change? Was the perpetrator aware of this change?</li> <li>• Is there any evidence of ethnicity-based discrimination around the same time as the offence? Was the perpetrator aware of this ethnic discrimination?</li> <li>• Was the confinement committed alongside other grave violations of international law?</li> <li>• Did the perpetrator ever acknowledge by words or actions their intent to commit any grave violation of international law in confining the victim(s)?</li> <li>• Was the perpetrator a member of a group or organisation implementing a policy to commit grave violations of international law?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that, while confined to the perpetrator's home without the possibility of escape, she fell pregnant three times as a result of rapes by the perpetrator.</li> <li>• Witness testimony by a member of the perpetrator's guard indicating that the pregnant women they guarded were 'wives' of the perpetrator.</li> <li>• Evidence collected during the physical examination of the victim, who had been confined to the perpetrator's home, indicating that she had been repeatedly raped and impregnated.</li> <li>• Documents demonstrating the change in ethnic composition of an area where forced pregnancy took place, such as census records.</li> <li>• An NGO report indicating that when women interviewed were forcibly made pregnant, they were told by the perpetrators that their child will be the same ethnicity as the perpetrator.</li> </ul>

Table 52: Article 8(2)(b)(xxii)-4 Cues for Practitioners

### 3.2.45 War Crime of Sexual Violence (Article 8(2)(b)(xxii)-6, Rome Statute)

Article 8(2)(b)(xxii)-6 of the Rome Statute prohibits the war crime of sexual violence when committed in the context of an international armed conflict.<sup>1014</sup>

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to sexual violence as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international instruments" as set out under Article 438(1). Sexual violence is a serious violation of IHL, applicable in international armed conflicts. Specifically, Article 27 of the Fourth Geneva Convention provides that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".<sup>1015</sup> Article 75 of Additional Protocol I further provides that all persons must be protected against "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault".<sup>1016</sup> As Ukraine is a party to the Fourth Geneva Convention and Additional Protocol I, this conduct can be charged as indecent assault under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of sexual violence under Article 438.2(8) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the war crime of sexual violence contained in the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>1017</sup>

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Element One of the war crime of sexual violence is the same as Element One of the crime against humanity of sexual violence under Article 7(1)(g)-6, discussed in detail above (*see* Section 3.2.11).

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<sup>1014</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(xxii). The Rome Statute also criminalises sexual violence as a war crime in non-international armed conflicts under Article 8(2)(e)(vi) and as a crime against humanity under Article 7(1)(g). Additionally, the prohibition of sexual violence is customary in nature: ICRC, Customary IHL Database, Rule 93. Rape and Other forms of Sexual Violence.

<sup>1015</sup> Fourth Geneva Convention, Article 27.

<sup>1016</sup> Additional Protocol I, Article 75(2)(b). *See also* Articles 76(1) and 77(1).

<sup>1017</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xxii)-6.

### 3.2.45.1 Element Two: The Conduct was of a Gravity Comparable to That of a Grave Breach of the Geneva Conventions

It should be noted that, according to the Rome Statute and Elements of Crimes, it must also be established that the perpetrator's conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions (e.g., wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering; or serious injury to body or health),<sup>1018</sup> and that the perpetrator was aware of the factual circumstances that established the gravity of the conduct. This gravity criterion should not be understood to exclude acts that do not involve penetration or physical contact.<sup>1019</sup> However, this requirement is unique to the Rome Statute and is not contained in the Geneva Conventions, customary international law, the statutes of the other international courts/tribunals or legislation in some European jurisdictions,<sup>1020</sup> including Ukraine.<sup>1021</sup> As such, this element would not need to be established to prove the war crime of sexual violence under the CCU or Draft Bill 7290. General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator committed an act of a sexual nature against</b>	<ul style="list-style-type: none"> <li>Did the perpetrator cause the victim(s) to engage in any physical or non-physical act of a sexual nature with the perpetrator?</li> <li>Did the perpetrator cause the victim(s) to engage in any physical or</li> </ul>	<ul style="list-style-type: none"> <li>A victim testifying that a soldier touched her genitals, grabbed her breast and threatened to rape her.</li> <li>A victim describing being forced to undress during a search by soldiers,</li> </ul>

<sup>1018</sup> First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; Fourth Geneva Convention, Article 147.

<sup>1019</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 216. To date, the only jurisprudence related to the 'comparable gravity' criterion relates to the related crime against humanity and emanates from the *Bemba* Arrest Warrant Decision where the Pre-Trial Chamber found that forcible undressing was not of comparable gravity to the other crimes in Article 7(1)(g): *Bemba* Arrest Warrant Decision, para. 40. However, jurisprudence from the *ad hoc* tribunals confirms that forced nudity is to be considered as an act of sexual violence: *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 688; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001, paras 769, 772; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001, para. 170; *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 1013; *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Appeal Judgement, 22 February 2008, para. 184. *See also*, UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para. 21; ICC, 'Report on Preliminary Examination Activities' (2016), para. 94; ICC Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014), p. 3.

<sup>1020</sup> *See*, Fourth Geneva Convention, Article 27: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". *See also*, ICRC, Customary IHL Database, Rule 93. Rape and Other forms of Sexual Violence; UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 4(e); UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 3(e); Germany, *Law Introducing the International Crimes Code*, 2002, Section 8(1)(4); Croatia, *Criminal Code*, 1997 (as amended in 2006), Article 158(1).

<sup>1021</sup> As 'comparable gravity' is not included in the definition of sexual violence under the Geneva Conventions, it is therefore not included within the ambit of Article 438 of the CCU.

<p><b>one or more persons or caused such person or persons to engage in an act of a sexual nature?</b></p>	<p>non-physical act of a sexual nature with themselves or another person?</p>	<p>who also touched her breasts and taunted her in a sexual manner.</p> <ul style="list-style-type: none"> <li>• Police reports describing the victim being forced to masturbate in front of soldiers.</li> <li>• A victim testifying that after three Russian servicemen broke into her home, she was gangraped by two of them while the third watched while masturbating.</li> <li>• Forensic evidence showing that the victim had been beaten, mutilated, and electrocuted on his genitals during interrogation.</li> <li>• Video evidence recorded on a mobile phone of soldiers forcing detainees to line up naked.</li> <li>• A UN report indicating that the Russian armed forces detained a priest, undressed him fully, beat him, and ordered him to parade naked for one hour in the streets of his village.</li> <li>• A Report of a UN Special Rapporteur describing testimonies of persons who had been sexually touched by prison guards.</li> <li>• Witness testimony that, while detained by the Russian forces, they were stripped naked and forced to stand in front of other for hours.</li> </ul>
<p><b>Did the perpetrator do so:</b></p>	<ul style="list-style-type: none"> <li>• by force;</li> <li>• by threat of force or coercion (e.g., fear of violence, duress, detention psychological oppression or abuse of power);</li> <li>• by taking advantage of a coercive environment; or</li> <li>• by taking advantage of a person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that she was forced to undress and walk in front of prison guards while in detention.</li> <li>• A video of soldiers with guns forcing women into a room where the sexual violence took place.</li> <li>• A report by Amnesty International describing the ongoing fighting and commission of other crimes in the village where the alleged acts of sexual violence took place.</li> <li>• A UN report describing an incident where two Russian soldiers entered entered a home, raped a 22-year-old woman several times, committed acts of sexual violence on her husband and forced the couple to have sexual intercourse in their presence.</li> </ul>

Table 53: Article 8(2)(b)(xxii)-6 Cues for Practitioners

### **3.2.46 War Crime of Using Protected Persons as Shields (Article 8(2)(b)(xxiii), Rome Statute)**

Article 8(2)(b)(xxiii) of the Rome Statute prohibits using protected persons as shields,<sup>1022</sup> which will occur when the presence of a civilian or other protected person is used to render certain points, areas or military forces immune from military operations.

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to using protected persons as shields as a war crime, this conduct is covered by "other violations of rules of the warfare stipulated by international instruments" as set out under Article 438(1). The Third and Fourth Geneva Conventions both provide that protected persons "may not be used to render certain points or areas immune from military operations".<sup>1023</sup> The same prohibition is set out in Article 51(7) of Additional Protocol I.<sup>1024</sup> As Ukraine is a party to the Third and Fourth Geneva Conventions and Additional Protocol I, this conduct can be charged as the use of the presence of protected persons to render certain points or areas immune from military operations under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific war crime of using "the presence of civilians or other persons under the protection of international humanitarian law to protect a particular point, area or armed forces from hostilities" under Article 438-2.1(1) of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of using protected persons as shields contained in the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>1025</sup>

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.
2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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<sup>1022</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(xxiii). The war crime of using human shields is customary in nature: ICRC, Customary IHL Database, Rule 97. Human Shields.

<sup>1023</sup> Third Geneva Convention, Article 23(1); Fourth Geneva Convention, Article 28.

<sup>1024</sup> Additional Protocol I, Article 51(7).

<sup>1025</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xxiii).



### **3.2.46.1 Element One: The Perpetrator Moved or Otherwise Took Advantage of the Location of One or More Civilians or Other Persons Protected under the International Law of Armed Conflict**

#### **3.2.46.1.1 *Protected Persons***

First, practitioners must determine whether the victims of the human shielding incident were protected persons. For information on who constitutes a ‘protected person’ under IHL, see Section 3.2.15.2.

#### **3.2.46.1.2 *Moved or Otherwise Took Advantage of the Location***

Second, practitioners should establish whether the perpetrator: (i) moved protected persons to the vicinity of a military objective; or (ii) otherwise took advantage of the location of protected persons in the area.<sup>1026</sup>

- “Moved” will be met if, for example, the perpetrator moved and positioned men, women and children in front of a hotel that served as the armed forces’ headquarters.<sup>1027</sup>
- “Otherwise took advantage of the location” requires the perpetrator to have taken advantage of locations where protected persons were already present, for instance by placing potential military targets within, or in close proximity to, sites benefiting from protection under IHL, such as prisoner of war (‘POW’) camps, hospitals, shelters and places dedicated to religion or education.<sup>1028</sup>

### **3.2.46.2 Element Two: The Perpetrator Intended to Shield a Military Objective from Attack or Shield, Favour or Impede Military Operations**

To establish this element, practitioners should seek information indicating that the perpetrator intended to shield a military objective or shield, favour or impede military operations. For example, the placement or detention of protected persons in areas where they may be exposed to combat operations, for the purpose of rendering such areas immune from military operations or armed attack, would constitute such shielding.<sup>1029</sup> Similarly launching attacks from areas in the immediate vicinity of civilian objectives such as schools, shelters or hospitals, with an intention to prevent military assets from being attacked due to the presence of the protected persons would also satisfy this requirement.<sup>1030</sup> Actual harm need not result.<sup>1031</sup>

Additionally, the information must show that the perpetrator intended to shield a military objective from attack or shield, favour or impede military operations. The intent of the perpetrator can be inferred from their acts or omissions as well as the circumstances of the case. For instance, a direct

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<sup>1026</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 505.

<sup>1027</sup> See e.g., *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000 (‘*Blaškić* Trial Judgment’), paras 714, 716.

<sup>1028</sup> See e.g., *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 (‘*Karadžić* Trial Judgment’), para. 525; Human Rights Council, ‘Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict’ (25 June 2015) A/HRC/29/CRP.4 (‘HRC, ‘Report on the 2014 Gaza Conflict’), para. 475.

<sup>1029</sup> See e.g., *Blaškić* Trial Judgment, paras 715, 716; *Karadžić* Trial Judgment, para. 525.

<sup>1030</sup> See e.g., HRC, ‘Report on the 2014 Gaza Conflict’, para. 479.

<sup>1031</sup> See e.g., *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgment, 29 July 2004, para. 654.

order from the perpetrator to their subordinates to use the victims as human shields can be taken as a clear indication of such intent.<sup>1032</sup> Similarly, the passive presence of the perpetrator and their attitude towards the victims of human shielding could also be indicative of their intention in this regard.<sup>1033</sup>

### 3.2.46.3 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the victims of the human shielding incident were civilians or other persons protected under the international law of armed conflict?</b>	<ul style="list-style-type: none"> <li>Who was the victim?</li> <li>Did the victim(s) fall within one of the categories of protected persons? <ul style="list-style-type: none"> <li>Was the victim a sick, wounded or shipwrecked member of an armed forces who ceased taking part in hostilities?</li> <li>Was the victim a POW or a detained person?</li> <li>Was the victim a civilian who found himself in the hands of a foreign power due to conflict or occupation?</li> <li>Was the victim medical or religious staff?</li> <li>Was the victim a parlementaire?</li> <li>Was the victim a civil defence personnel?</li> <li>Was the victim assigned to protect cultural property?</li> </ul> </li> <li>Is there anything to indicate that the perpetrator knew that the victim's status as a protected person?</li> <li>Do the surrounding circumstances indicate the perpetrator would have known the victim's status as a protected person?</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that the victims were dressed in civilian clothes.</li> <li>Testimony of the victim that they were assigned to protect cultural property.</li> <li>Photos and videos depicting individuals in civilian clothing being lined up in front of a military barracks.</li> <li>A UN report indicating that the victims who were forced to sit outside the military headquarters were civilians.</li> </ul>
<b>Does the evidence show that the perpetrator moved or otherwise took advantage of the location of one or more civilians or</b>	<ul style="list-style-type: none"> <li>Where were the victims originally located?</li> <li>What did the perpetrator do to the victims?</li> <li>Were the victims moved to another location? Where?</li> <li>Were there any civilians or other protected persons in the proximity</li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that he and other detainees had to accompany soldiers during attacks.</li> <li>A military report detailing the locations from which an armed group launched projectiles, which included within the immediate vicinity of medical facilities.</li> <li>Shelling cases nearby civilian houses indicating the position of artillery.</li> </ul>

<sup>1032</sup> See e.g., *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2005, para. 290.

<sup>1033</sup> See e.g., *Prosecutor v. Aleksovski*, IT-95-14/1-T, Trial Judgment, 25 June 1999, para. 129.

<p><b>other protected persons?</b></p>	<p>of the location where the perpetrator situated their armed forces?</p> <ul style="list-style-type: none"> <li>• Did the suspect carry out military operations in the proximity of civilians or other protected persons?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the Russian armed forces parked tanks and other military vehicles next to civilian homes and shot at Ukrainian positions from between the houses (in which civilians were still living).</li> <li>• Photos and videos indicating that the perpetrator launched an attack from the vicinity of a civilian hotel, apartment buildings and a church compound.</li> <li>• A UN report indicating that POWs were taken to the front line to accompany the adversary's armed forces.</li> <li>• A UN report indicating that Russian soldiers confined 365 civilians in the basement of a school, while they established their headquarters on the ground floor of the same building and launched attacks on Ukrainian positions from the grounds of the school.</li> </ul>
<p><b>Does the evidence show that the perpetrator intended to shield a military objective from attack or shield, favour or impede military operations?</b></p>	<ul style="list-style-type: none"> <li>• Why did the perpetrator move the civilians to the location in question?</li> <li>• Why did the perpetrator conduct military operations at the location in question? Could they have conducted military operations in another location where there were no civilians or civilian objects?</li> <li>• Was the perpetrator aware of the fact that the victims were being used as human shields?</li> <li>• Do the perpetrator's actions or the circumstances indicate that they intended to use the victims as human shields?</li> <li>• Is there any specific piece of evidence demonstrating the intention of the perpetrator to use the victims as human shields?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim testifying that the perpetrator directly ordered prisoners to be used as human shields.</li> <li>• A military diary documenting the perpetrator's intention to use civilians as human shields to discourage attack from the opposing forces.</li> <li>• Photos or videos depicting the perpetrator inspecting artillery positions where POWs were positioned.</li> <li>• A UN report condemning the orders of the perpetrator to use human shields.</li> </ul>

Table 54: Article 8(2)(b)(xxiii) Cues for Practitioners

### 3.2.47 War Crime of Starvation (Article 8(2)(b)(xxv), Rome Statute)

Article 8(2)(b)(xxv) of the Rome Statute prohibits starvation as a war crime,<sup>1034</sup> which occurs when starvation of civilians is intentionally used as a method of warfare in an international armed conflict by depriving them of objects indispensable to their survival ('OIS').

While Article 438(1) of the Criminal Code of Ukraine ('CCU') does not refer to the war crime of starvation, this conduct is covered by "other violations of rules of the warfare stipulated by international instruments" as set out under Article 438(1). This conduct is prohibited under Article 54(1) of Additional Protocol I, which provides that "[s]tarvation of civilians as a method of warfare is prohibited".<sup>1035</sup> As Ukraine is a party to Additional Protocol I, this conduct can be charged as starvation of civilians as a method of warfare under Article 438(1) of the CCU.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the war crime of "acts aimed at creating famine for the civilian population as a method of waging war [...] including by creating obstacles to the provision of assistance" under Article 438-2.2(7) of the CCU. This provision covers substantially the same contextual elements and specific elements of the war crime of starvation contained in the Rome Statute and ICC Elements of Crimes.

The elements of this crime are:<sup>1036</sup>

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### 3.2.47.1 Element One: The Perpetrator Deprived Civilians of Objects Indispensable to Their Survival

First, practitioners should seek information showing that civilians have been deprived of OIS. The deprivation itself suffices, even if starvation has not yet taken effect. Thus, there is no need to demonstrate that the victims did indeed suffer or die as a result.<sup>1037</sup> To this end, the information gathered must demonstrate that: (i) the perpetrator *deprived* certain objects; (ii) such objects were *indispensable* to the civilians' survival; and (iii) the deprivation was aimed at *civilians*.

<sup>1034</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8(2)(b)(xxv). Starvation in an international armed conflict is also criminalised in Law on Specialist Chambers and Special Prosecutor's Office, Article 14(1)(b)(xxv) and Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Articles 28D(b)(xxvi). However, it was not provided for in the statutory instruments of any of the earlier international(ised) criminal courts and tribunals *cf.* Charter of the International Military Tribunal, International Military Tribunal for the Far East Charter, Statute of the International Tribunal for the former Yugoslavia, Statute of the International Tribunal for Rwanda, Statute of the Special Court for Sierra Leone, and Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

<sup>1035</sup> Additional Protocol I, Article 54(1).

<sup>1036</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8(2)(b)(xxv).

<sup>1037</sup> The casualties will, however, be relevant to the determination of the sentence.

The indispensable nature of the objects can be *perpetual* (e.g., foodstuff, water) or *specific* to a conflict (e.g., due to seasonal or territorial variances), a group of victims (e.g., children, nursing mothers, cholera patients) or the weather condition (e.g., freezing nights, heatwave).<sup>1038</sup> The following likely qualify as OIS:

- Crops, livestock and other agricultural areas for the production of foodstuffs;
- Drinking water installations/supplies and irrigation works;
- Medical supplies;
- Means of shelter; and
- Fuel and electricity power.

The deprivation must be aimed at *civilians*, i.e., all persons who are not members of the armed forces (see Section 2.1.3.1).<sup>1039</sup> Where an object serves both military and civilian functions, its attack could still be regarded as ‘aiming at civilians’ if the incidental damage is excessive in relation to the concrete and direct military advantage anticipated.<sup>1040</sup>

In addition, it is commonly accepted that the prohibition of starvation implies that the besieging party must either allow the free passage of humanitarian relief or allow the evacuation of the civilians inhabiting the area.<sup>1041</sup>

### 3.2.47.2 Element Two: The Perpetrator Intended to Starve Civilians as a Method of Warfare

Second, practitioners must seek information indicating that the perpetrator had the *intention to bring about the outcome of starvation* as a method of warfare. Again, it does not matter if the perpetrator succeeded in causing starvation so long as the desire was present. The intention to starve need not be the sole desire. It is irrelevant if the perpetrator was simultaneously seeking other lawful or unlawful goals.<sup>1042</sup>

For the use of starvation to constitute a *method of warfare*, it must be implemented through a “specific, tactical or strategic”<sup>1043</sup> way of conducting hostilities designed to “overwhelm and weaken the adversary”.<sup>1044</sup> Concretely, it suffices to demonstrate that starvation was linked to the military activities.

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<sup>1038</sup> K. Dörmann, L. Doswald-Beck and R. Kolb, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003), p. 475.

<sup>1039</sup> *Third Geneva Convention*, Article 4; *Additional Protocol I*, Article 50. It is not illegal to deprive enemy combatants of OIS unless they are wounded, sick, shipwrecked, captured or detained. See, *Additional Protocol I*, Article 54(3); *Commentary on the Additional Protocols*, p. 657 regarding *Additional Protocol I*, Article 54(3).

<sup>1040</sup> On the principle of proportionality, See, *Additional Protocol I*, Article 51(5)(b); ICRC, Customary IHL Database, Rule 14.

<sup>1041</sup> N. Melzer and G. Gaggioli, ‘Methods of Warfare’ in B. Saul and D. Akande (eds), *Oxford Guide to International Humanitarian Law* (OUP 2019) (‘Melzer & Gaggioli, ‘Methods of Warfare’”), pp. 249-250; ICRC, Customary IHL Database, Rules 53-55. See also, D. Akande and E.-C. Gillard, ‘Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict’ (2016).

<sup>1042</sup> *Prosecutor v. Eliézer Niyitegeka*, ICTR-96-14-A, Trial Judgment, 9 July 2004, para. 53; *Prosecutor v. Goran Jelisić*, IT-95-10-A, Trial Judgment, 5 July 2001, para. 49.

<sup>1043</sup> See, P.J. Cameron, ‘The limitations on Methods and Means of Warfare’ (1980) 9 *Australian Yearbook of International Law* 247, p. 247.

<sup>1044</sup> N. Melzer and G. Gaggioli, ‘Methods of Warfare’ in B. Saul and D. Akande (eds), *Oxford Guide to International Humanitarian Law* (OUP 2019) (‘Melzer & Gaggioli, ‘Methods of Warfare’”), p. 4.

### 3.2.47.3 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to all war crimes, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator deprived civilians of OIS?</b>	<ul style="list-style-type: none"> <li>• What type of objects were attacked, destroyed, removed or rendered useless by the perpetrator?</li> <li>• Were the targeted objects used or relied upon by civilians?</li> <li>• Were civilians affected by such conduct? If so, what were the effects?</li> <li>• Could the objects targeted by the perpetrator be considered as indispensable for the survival of civilians in the prevailing circumstances?</li> <li>• Were the objects being used exclusively by combatants or in direct support of military action?</li> <li>• Did the perpetrator target these objects in their national territory as a tactic against invaders?</li> <li>• Did the perpetrator fail to take measures to ensure that civilians are supplied with OIS?</li> <li>• Did the perpetrator divert or impede humanitarian aid, for instance, by imposing arbitrary or excessive taxes, charges or technical arrangements?</li> <li>• Has the perpetrator closed or shelled an airport or a seaport that was being used or was going to be used to deliver humanitarian aid or other OIS?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that supply convoys were not allowed to pass through to a locality which caused the already limited resources of the civilian population to dwindle.</li> <li>• Victims testifying that during the Russian armed forces' siege of Mariupol they were faced with below-freezing temperatures, unsanitary living conditions and little to no access to food, running water, power, heating, medical care or mobile phone service.</li> <li>• Military reports demonstrating the urgent pleas made by a State to its adversary to lift the blockade and open a humanitarian aid corridor to prevent its nationals from dying as a result of starvation.</li> <li>• Remnants of vehicles belonging to a humanitarian aid convoy destroyed by the perpetrator(s).</li> <li>• Photographs or videos, including satellite and ground imagery, showing that aid convoys containing humanitarian supplies were attacked.</li> <li>• A UN OHCHR report indicating that hunger is being used to break down the 'other side' in the conflict and that the right to adequate food, water and health care was repeatedly violated.</li> </ul>
<b>Does the evidence show that the perpetrator intended to starve civilians as a method of warfare?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator deprive civilians of OIS as a method of warfare, i.e., in the course of active hostilities with the enemy?</li> <li>• Is there any evidence indicating that the perpetrator used the deprivation of OIS as a bargaining tool to obtain a military advantage or to pressure an opponent to surrender?</li> <li>• Is there any evidence that the perpetrator had the primary intention to starve civilians?</li> </ul>	<ul style="list-style-type: none"> <li>• Statements from the perpetrators showing that starvation was intentionally used as a method of warfare.</li> <li>• A map used by the perpetrators in planning military operations where civilian agricultural areas for the production of foodstuffs and water installations have been marked as targets.</li> <li>• Landmines laid by the perpetrators across agricultural areas preventing cultivation.</li> </ul>



	<ul style="list-style-type: none"> <li>• Is there any evidence which indicates that the perpetrator intended to target OIS?</li> <li>• Is there evidence of repeated attacks on OIS which were located at a significant distance from any legitimate military targets?</li> <li>• Is there any evidence indicating that the perpetrator knew their conduct would almost certainly cause the starvation of civilians by depriving them of OIS in the ordinary course of events?</li> </ul>	<ul style="list-style-type: none"> <li>• Photos of signs and graffiti on walls and checkpoints reading “kneel or starve”.</li> <li>• Reports from international organisations providing details of meetings held by the perpetrators where a strategy to deprive civilians of food was discussed.</li> </ul>
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Table 55: Article 8(2)(b)(xxv) Cues for Practitioners

### 3.2.48 Genocide by Killing (Article 2(a), Genocide Convention; Article 6(a), Rome Statute)

Article 2(a) of the Genocide Convention and Article 6(a) of the Rome Statute prohibit genocide by killing one or more persons who belong to a national, ethnic, racial or religious group with the intent to destroy such group.<sup>1045</sup> This conduct is broadly covered by Article 442 of the Criminal Code of Ukraine (‘CCU’), which includes “extermination of members of any such group”.

Article 442 of the Criminal Code of Ukraine (‘CCU’), includes “extermination of members of any such group” as an underlying act of genocide. In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the commission of genocide by “deprivation of life of members of this group” under Article 442.1(1) of the CCU.

This language covers the same conduct as “killing members of the group”, as codified as an act of genocide under the Genocide Convention and the Rome Statute.

The elements of this crime are:<sup>1046</sup>

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

<sup>1045</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 6(a). This prohibition is derived from the Genocide Convention and forms part of customary international law. See, Genocide Convention, Article 2(a); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 161. Genocide by killing is also prohibited by the following international instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 4(a); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 2(2)(a); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 (‘ECCC Law’), Article 4.

<sup>1046</sup> International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 6(a).

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

### 3.2.48.1 Element One: The Perpetrator Killed One or More Persons

To establish this element, practitioners should seek information showing that one or more persons was killed by the perpetrator. This could be carried out directly (e.g., shooting to death), or indirectly (e.g., withholding medication) through an act or omission.<sup>1047</sup> There must be proof of result (i.e., the death of the victim)<sup>1048</sup> and the perpetrator's conduct must have been a substantial cause of the death of the victim.<sup>1049</sup> Suicide can amount to killing if the perpetrator's actions or omission "induced the victim to take actions which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence."<sup>1050</sup>

### 3.2.48.2 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to acts of genocide, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator killed one or more persons?</b>	<ul style="list-style-type: none"> <li>• Did one or more persons die? If so, how many, when, where and how?</li> <li>• Has a corpse been recovered? If so, when, from where, how and by whom?</li> <li>• If no corpse has been recovered, when and where was the alleged victim(s) last seen?</li> <li>• Were there other crimes committed in the area in which the victim was last seen? If so, which crimes?</li> <li>• Who was responsible for the death of the victim(s)?</li> <li>• What method(s) did the perpetrators use in killing the victim(s)?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that unarmed civilians were shot and killed in front of a school.</li> <li>• Military documents documenting the process in which the armed group killed members of a particular ethnic group that were in their custody.</li> <li>• Forensic autopsies of victims establishing that their cause of death was gunshot wounds, head traumas, blast injuries or explosive wounds.</li> <li>• Aerial photographs displaying the mass graves containing the bodies of multiple victims of killings carried out by the perpetrators.</li> <li>• A UN report documenting the massacres which took place in which one ethnic group was killed by perpetrators from another in a planned and methodical manner.</li> </ul>

Table 56: Article 6(a) Cues for Practitioners

<sup>1047</sup> *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, *Decision on the Confirmation of Charges*, 30 September 2008, para. 287. *See also, Prosecutor v. Brđanin*, IT-99-36-T, *Trial Judgment*, 1 September 2014, para. 739, where the ICTY established that the meaning of "killing" as an element of genocide is identical to the material elements of other similar international crimes, e.g., war crimes and crimes against humanity involving acts of "killing".

<sup>1048</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, *Trial Judgment*, 24 March 2016 ('*Karadžić Trial Judgment*'), para. 542; *Prosecutor v. Brđanin*, IT-99-36-T, *Trial Judgment*, 1 September 2014, para. 688; *Prosecutor v. Stakić*, IT-97-24-T, *Trial Judgment*, 31 July 2003 ('*Stakić Trial Judgment*'), para. 514.

<sup>1049</sup> *Prosecutor v. Delalić et al.*, IT-96-21-T, *Trial Judgment*, 16 November 1998 ('*Delalić et al. Trial Judgment*'), para. 424.

<sup>1050</sup> *Prosecutor v. Krnojelac*, IT-97-25, *Trial Judgment*, 15 March 2002 ('*Krnojelac Trial Judgment*'), para. 329.

### **3.2.49 Genocide by Causing Serious Bodily or Mental Harm (Article 2(b), Genocide Convention; Article 6(b), Rome Statute)**

Article 2(b) of the Genocide Convention and Article 6(b) of the Rome Statute prohibits genocide by causing serious bodily or mental harm to one or more persons who belong to a national, ethnic, racial or religious group with the intent to destroy such group.<sup>1051</sup> This includes acts of torture, rape, sexual violence or inhuman or degrading treatment.<sup>1052</sup> This conduct is broadly covered by Article 442 of the Criminal Code of Ukraine ('CCU'), which covers genocide by "inflicting grave bodily injuries on them".

Article 442 of the Criminal Code of Ukraine ('CCU') refers to genocide by "inflicting grave bodily injuries on them". This phrase should be interpreted broadly to also include mental harm as a form of bodily injury.

In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the commission of genocide by "causing them serious harm" under Article 442.1(2) of the CCU. Additionally, an accompanying note to Article 442 states that "[s]erious harm in this article should be understood as intentional infliction of grievous bodily harm or moderate bodily injury, rape or other forms of sexual violence, intentional infliction of severe physical pain or physical or moral suffering".

This language covers the same conduct as "causing serious bodily or mental harm", as codified as an act of genocide under the Genocide Convention and the Rome Statute.

The elements of this crime are:<sup>1053</sup>

1. The perpetrator caused serious bodily or mental harm to one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

<sup>1051</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 6(b). This prohibition is derived from the Genocide Convention and forms part of customary international law. See, Genocide Convention, Article 2(b); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 161. Genocide by killing is also prohibited by the following international instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 4(b); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 2(2)(b); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 4.

<sup>1052</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 6(b), fn. 3.

<sup>1053</sup> ICC Elements of Crimes, Article 6(b).

### 3.2.49.1 Element One: The Perpetrator Caused Serious Bodily or Mental Harm to One or More Persons

To establish this element, practitioners must show that the perpetrator(s) caused serious bodily or mental harm to one or more persons. This requires proof of a result.<sup>1054</sup>

- **Bodily harm:** the infliction of serious physical injury on a victim.<sup>1055</sup> For example, acts such as sexual violence, beatings, mutilation and cruel treatment that cause serious injury to health, disfigurement or any serious injury to the external or internal organs or senses.<sup>1056</sup>
- **Mental harm:** the infliction of psychological injury that goes beyond minor or temporary impairment of mental faculties.<sup>1057</sup> It can be caused by the infliction of strong fear or terror, intimidation or threat.<sup>1058</sup> For example, this could include mental trauma caused by being captured or kidnapped, forcibly separated from family or subjected to physical violence, such as rape or torture.<sup>1059</sup>

The bodily or mental harm must be serious.<sup>1060</sup> The harm must “go beyond temporary unhappiness, embarrassment or humiliation and inflict grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.<sup>1061</sup> However, it is not required that the injury is permanent or irreparable.<sup>1062</sup>

Rape and other forms of sexual violence have been recognised as amounting to serious bodily and mental harm as an act of genocide by the ICTR and the ICTY.<sup>1063</sup> The ICC Elements of Crimes now explicitly recognises that serious bodily and mental harm may include rape and sexual violence.<sup>1064</sup>

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<sup>1054</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 (*Karadžić Trial Judgment*), para. 543; *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Judgment, 12 December 2012 (*Tolimir Trial Judgment*), para. 737; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment, 10 June 2010 (*Popović et al. Trial Judgment*), para. 811; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2014 (*Brđanin Trial Judgment*), para. 688; *Prosecutor v. Stakić*, IT-97-24-T, Trial Judgment, 31 July 2003 (*Stakić Trial Judgment*), para. 514.

<sup>1055</sup> *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, Trial Judgment, 22 January 2004 (*Kamuhanda Trial Judgment*), para. 633; *Karadžić Trial Judgment*, para. 544.

<sup>1056</sup> *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999 (*Kayishema et al. Trial Judgment*), para. 109.

<sup>1057</sup> *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001 (*Krstić Trial Judgment*), para. 510; *Kamuhanda Trial Judgment*, para. 633.

<sup>1058</sup> *Prosecutor v. Seromba*, ICTR-2001-66-A, Appeal Judgment, 12 March 2008 (*Seromba Appeal Judgment*), para. 46.

<sup>1059</sup> *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005, para. 649; *Seromba Appeal Judgment*, para. 46; *Krstić Trial Judgment*, para. 510.

<sup>1060</sup> *Seromba Appeal Judgment*, para. 46; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Trial Judgment, 1 December 2003 (*Kajelijeli Trial Judgment*), para. 814; *Prosecutor v. Tolimir*, IT-05-88/2, Appeal Judgment, 8 April 2015 (*Tolimir Appeal Judgment*), para. 201; *Karadžić Trial Judgment*, para. 543; *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Judgment, 27 September 2006 (*Krajišnik Trial Judgment*), para. 862.

<sup>1061</sup> *Tolimir Appeal Judgment*, para. 201; *Karadžić Trial Judgment*, para. 543.

<sup>1062</sup> *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (*Semanza Judgment and Sentence*), para. 320; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment and Sentence, 6 December 1999, para. 51; *Kajelijeli Trial Judgment*, para. 815.

<sup>1063</sup> See, e.g., *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (*Akayesu Trial Judgment*), para. 731; *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-T, Judgment and Sentence, 2 February 2012 (*Karemera and Ngirumpatse Judgment and Sentence*), paras 1665-1668; *Stakić Trial Judgment*, para. 516; *Krstić Trial Judgment*, para. 513. See also, *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999 (*Kayishema et al. Trial Judgment*), para. 108; *Seromba Appeal Judgment*, para. 46; *Karadžić Trial Judgment*, para. 37; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (*Bosnia Genocide Judgment*) para. 319.

<sup>1064</sup> ICC Elements of Crimes, Article 6(b), fn. 3.

### 3.2.49.2 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual element common to acts of genocide, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator caused serious bodily or mental harm to one or more persons?</b>	<ul style="list-style-type: none"> <li>• Were one or more persons subjected to any form of mistreatment?</li> <li>• What was the nature of the mistreatment?</li> <li>• What was the effect of the mistreatment on the victims?</li> <li>• Did the victims suffer physical or mental harm as a result of the mistreatment?</li> <li>• Was the harm inflicted on the victims serious? Did it go beyond temporary physical or mental ailment?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims testifying that they were severely beaten for a long period of time with batons, chairs and feet, which caused them serious physical injury.</li> <li>• A medical report indicating the serious physical and mental effects of the mistreatment that the victim suffered at the hands of the perpetrators.</li> <li>• A physical assessment carried out by a doctor on the serious vaginal injuries inflicted on the victim by the perpetrator.</li> <li>• A psychological report of a victim detailing the mental trauma she faced as a result of sexual violence.</li> <li>• A photograph indicating various positions at the roadblock where beatings perpetrated against the victims had occurred.</li> <li>• Reports of Human Rights Watch and the United Nations indicating that members of a specific ethnic group were subjected to severe acts of torture by the perpetrators.</li> </ul>

Table 57: Article 6(b) Cues for Practitioners

### 3.2.50 Genocide by Inflicting Conditions of Life Calculated to Bring about Physical Destruction (Article 2(c), Genocide Convention; Article 6(c), Rome Statute)

Article 2(c) of the Genocide Convention and Article 6(c) of the Rome Statute prohibits genocide by deliberately inflicting conditions of life calculated to bring about the physical destruction of a national, ethnic, racial or religious group with the intent to destroy such group.<sup>1065</sup> This conduct is

<sup>1065</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 6(c). This prohibition is derived from the Genocide Convention and forms part of customary international law. *See*, Genocide Convention, Article 2(c); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 161. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction is also prohibited by the following international instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 4(c); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 2(2)(c); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the



broadly covered by Article 442 of the Criminal Code of Ukraine ('CCU'), which covers genocide by the "creation of life conditions aimed at total or partial physical destruction of the group".

Article 442 of the Criminal Code of Ukraine ('CCU') covers genocide by the "creation of life conditions aimed at total or partial physical destruction of the group". In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the commission of genocide by the "creation of living conditions for the group, aimed at its complete or partial physical destruction" under Article 442.1(3) of the CCU.

This language covers the same conduct as "inflicting conditions of life calculated to bring about physical destruction", as codified as an act of genocide under the Genocide Convention and the Rome Statute.

The elements of this crime are:<sup>1066</sup>

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

#### **3.2.50.1 Element One: The Perpetrator Inflicted Certain Conditions of Life upon One or More Persons**

This element requires practitioners to seek information which demonstrates that the perpetrator imposed certain conditions of life upon one or more persons. According to the ICC Elements of Crimes, "conditions of life" includes, but is not limited to, "deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes".<sup>1067</sup> These conditions must have been of a nature that would not immediately lead to the death of the victims, but, instead, to a slow death for the victims over a certain period of time.<sup>1068</sup>

This act of genocide does not require proof of a result attained, meaning that it is not required to prove the conditions actually lead to death or serious bodily or mental harm.<sup>1069</sup> Where such a result

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courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 4.

<sup>1066</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 6(c).

<sup>1067</sup> ICC Elements of Crimes, Article 6(c), fn. 4.

<sup>1068</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 ('Akayesu Trial Judgment'), para. 505; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment and Sentence, 6 December 1999 ('Rutaganda Judgment and Sentence'), para. 52.

<sup>1069</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 ('Karadžić Trial Judgment'), para. 546; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment, 10 June 2010 ('Popović et al. Trial Judgment'), para. 814; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2014 ('Brđanin Trial Judgment'), para. 691; *Prosecutor v. Stakić*, IT-97-24-T, Trial Judgment, 31 July 2003 ('Stakić Trial Judgment'), para. 517.



is established, the appropriate charge would be genocide by killing (*see* Section 3.2.48), or genocide by causing serious bodily or mental harm (*see* Section 3.2.49).<sup>1070</sup>

The following conditions imposed on one or more persons may satisfy this element:<sup>1071</sup>

- Deprivation of adequate food and water;
- Systematic expulsion of members of the group from their homes or deportation;
- Lack of proper accommodation;
- Lack of sufficient clothing, sanitation and hygiene;
- Excessive work or physical exertion; or
- Denial of the right to medical services.

#### ***3.2.50.2 Element Four: The Conditions of Life Were Calculated to Bring About the Physical Destruction of the Group, in Whole or in Part***

Practitioners must also establish that the conditions of life imposed by the perpetrator were *calculated* to bring about the physical destruction of the group. The “physical destruction” of the group means the actual destruction of the group (for instance through the deaths of its members), as opposed to the destruction of the national, linguistic, religious, cultural or other identity of the group.<sup>1072</sup> However, it is not necessary to prove that the conduct actually succeeded in causing the physical destruction of the group.<sup>1073</sup>

When assessing this element, practitioners should consider whether there was an “objective probability of these conditions leading to the physical destruction of the group” by evaluating:<sup>1074</sup>

- The nature of the conditions imposed;
- The length of time the members of the group was subjected to such conditions;
- The characteristics of the group, such as its vulnerability; and
- The cumulative effect of the conditions on the victims.

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<sup>1070</sup> *Karadžić Trial Judgment*, para. 546; *Prosecutor v. Tolimir*, IT-05-88/2, *Appeal Judgment*, 8 April 2015 (*Tolimir Appeal Judgment*), paras 227–228; *Prosecutor v. Brđanin*, IT-99-36-T, *Trial Judgment*, 1 September 2014 (*Brđanin Trial Judgment*), para. 905, fn. 2255. *See also*, *Attorney-General of the Government of Israel v. Eichmann*, 40/61, *Judgment*, District Court, Jerusalem, 11 December 1961, para. 196, limiting the charge of imposing living conditions upon Jews calculated to bring about their physical extermination to persecution of Jews who had survived the Holocaust and ruling that Jews who were not saved should not be included “as if, in their case, there were two separate actions: first, subjection to living conditions calculated to bring about their physical destruction, and later the physical destruction itself”.

<sup>1071</sup> ICC *Elements of Crimes*, Article 6(c), fn. 4; *Akayesu Trial Judgment*, para. 506; *Prosecutor v. Brđanin*, IT-99-36-T, *Trial Judgment*, 1 September 2014 (*Brđanin Trial Judgment*), paras 912, 920, 928; *Prosecutor v. Stakić*, IT-97-24-T, *Trial Judgment*, 31 July 2003 (*Stakić Trial Judgment*), para. 517; *Rutaganda Judgment and Sentence*, para. 52; *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, *Trial Judgment*, 21 May 1999, paras 115–116; *Prosecutor v. Karadžić*, IT-95-5/18-T, *Trial Judgment*, 24 March 2016 (*Karadžić Trial Judgment*), para. 547.

<sup>1072</sup> *Stakić Trial Judgment*, para. 518.

<sup>1073</sup> *Stakić Trial Judgment*, para. 517.

<sup>1074</sup> *Brđanin Trial Judgment*, paras 906, 970–971 (fn. 2444); *Karadžić Trial Judgment*, para. 548; *Attorney-General of the Government of Israel v. Eichmann*, 40/61, *Judgment*, District Court, Jerusalem, 11 December 1961, paras 129–130.

### 3.2.50.3 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual elements common to acts of genocide, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator inflicted certain conditions of life upon one or more persons?</b>	<ul style="list-style-type: none"> <li>• What conditions of life were inflicted upon the victims?</li> <li>• For example, <ul style="list-style-type: none"> <li>○ Were the victims subjected to deliberate deprivation of resources, such as food or medical services?</li> <li>○ Were the victims systematically expelled from their homes?</li> <li>○ What was the role of the perpetrator in the infliction of conditions upon such persons?</li> <li>○ Were the victims denied adequate medical treatment?</li> <li>○ Were the victims denied adequate and humane living accommodation (size, temperature and cleanliness)?</li> <li>○ Were the victims subjected to excessive work or physical exertion?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that little food was provided to detainees, and they were required to work constantly in harsh conditions.</li> <li>• Medical reports produced as a result of an examination of the surviving victims showing that they suffered serious physical injury as a result of the conditions imposed upon them by the perpetrator, including deprivation of food, water and clothing.</li> <li>• The clothes and wooden shoes that were assigned to the captives of the labour camp, which were improper for the conditions under which they were living.</li> <li>• Photographs depicting burned tree stumps and no visible signs of vegetation in the areas attacked by the armed group demonstrating that the perpetrators destroyed the victims' means of survival.</li> <li>• An NGO report establishing that there was widespread destruction of water sources and the destruction of family compounds that provided shelter for the victims.</li> </ul>
<b>Does the evidence show that the conditions of life were calculated to bring about the physical destruction of the group, in whole or in part?</b>	<ul style="list-style-type: none"> <li>• Did the measures ultimately seek to physically destroy the group?</li> <li>• Was there an objective probability that the conditions of life would lead to physical destruction? In particular: <ul style="list-style-type: none"> <li>○ What was the nature of the conditions imposed?</li> <li>○ How long were members of the group subjected to such conditions?</li> <li>○ Did any characteristics of the group mark them out as particularly vulnerable?</li> <li>○ What was the effect of the conditions?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony indicating that, during the many months in which they were detained, they were subjected to severe and unsanitary living conditions, many got sick and many other detainees died.</li> <li>• Witness testimony describing the lack of food she was provided while she was held captive, causing her to lose significant body weight.</li> <li>• Medical examination reports of the surviving victims from a village that had been under siege for a year showing that they suffered serious physical and mental effects as a result of the conditions of starvation that were imposed upon them by the perpetrator.</li> <li>• Photographs depicting burned tree stumps and no visible signs of</li> </ul>

		<p>vegetation in the areas attacked by the armed group demonstrating that the perpetrators destroyed the victims' means of survival.</p> <ul style="list-style-type: none"> <li>• A UN report describing the horrific conditions in which detainees had been kept by the perpetrators, which it concluded demonstrated a complete disregard for the survival of the detainees, all of whom belonged to an ethnic group that was different than that of the perpetrators.</li> </ul>
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Table 58: Article 6(c) Cues for Practitioners

### 3.2.51 Genocide by Imposing Measures Intended to Prevent Births (Article 2(d), Genocide Convention; Article 6(d), Rome Statute)

Article 2(d) of the Genocide Convention and Article 6(d) of the Rome Statute prohibits genocide by imposing measures intended to prevent births in a national, ethnic, racial or religious group with the intent to destroy such group.<sup>1075</sup> This conduct is broadly covered by Article 442 of the Criminal Code of Ukraine ('CCU'), which covers genocide by "decrease or prevention of childbearing in that group".

Article 442 of the Criminal Code of Ukraine ('CCU') covers genocide by "decrease or prevention of childbearing in that group". In addition, Drafts Bill 7290 will introduce (if, and when, it comes into force) the commission of genocide by "taking measures designed to prevent childbirth in such a group" under Article 442.1(4) of the CCU.

This language covers the broadly same conduct as "inflicting measures intended to prevent births", as codified as an act of genocide under the Genocide Convention and the Rome Statute.

The elements of this crime are:<sup>1076</sup>

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

<sup>1075</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 6(d). This prohibition is derived from the Genocide Convention and forms part of customary international law. See, Genocide Convention, Article 2(d); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 161. Genocide by imposing measures intended to prevent births is also prohibited by the following international instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 4(d); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 2(2)(d); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 4.

<sup>1076</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 6(d).

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

### 3.2.51.1 Element One: The Perpetrator Inflicted Certain Measures Upon One or More Persons

First, practitioners should seek information that the perpetrator(s) inflicted certain measures upon one or more persons. Such measures could be both physical and mental:

- **Physical measures** include: forced sterilisation; sexual mutilation; forced birth control; compulsory abortion; segregation of sexes; and obstacles to marriage.<sup>1077</sup>
- **Mental measures** are those which may leave the physical ability of the victim to procreate intact, but have mental consequences that prevent them from doing so as a result of traumatic experiences.<sup>1078</sup>

### 3.2.51.2 Element Four: The Measures Imposed Were Intended to Prevent Births Within a Group

Second, practitioners must establish that the measures imposed by the perpetrator were intended to prevent births within the targeted group. The nature of the measure (i.e., its intention to prevent births within the group) is a circumstantial element, and could refer to the intent of a third party rather than the perpetrator.<sup>1079</sup>

Such intention can be inferred from the nature of the measure imposed (i.e., physical or mental, *see* above), or the circumstances under which it was imposed.<sup>1080</sup> For instance, in patriarchal societies where membership of a group is determined by paternal lineage, rape in order to deliberately impregnate a woman by a member of another group would satisfy this element.<sup>1081</sup>

### 3.2.51.3 General Contextual and Mental Elements

Finally, practitioners should seek information establishing the general contextual elements common to acts of genocide, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

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<sup>1077</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016), p. 139; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 ('*Akayesu Trial Judgment*'), para. 507.

<sup>1078</sup> *Akayesu Trial Judgment*, paras 507-508.

<sup>1079</sup> M. Klamberg and J. Nilsson (eds), *Commentary on the Law of the International Criminal Court – The Rome Statute* (2017) p 27.

<sup>1080</sup> *See generally on intent being inferred from the circumstances, Akayesu Trial Judgment*, para. 523; *Prosecutor v. Sikirica et al.*, IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001 ('*Sikirica et al. Judgment on Defence Motions to Acquit*'), para. 46; *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 93. *See also, Akayesu Trial Judgment*, para. 507, which placed its analysis of measures intended to prevent births within the context of 'patriarchal societies'.

<sup>1081</sup> *Akayesu Trial Judgment*, para. 507.

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator imposed certain measures upon one or more persons?</b>	<ul style="list-style-type: none"> <li>• Were certain measures imposed upon one or more persons? For example: <ul style="list-style-type: none"> <li>○ Rape</li> <li>○ Forced sterilisation</li> <li>○ Sexual mutilation</li> <li>○ Forced birth control</li> <li>○ Compulsory abortion</li> <li>○ Separation of males and females</li> <li>○ Forced impregnation</li> <li>○ Prohibition on marriage</li> </ul> </li> <li>• Were certain mental measures imposed on one or more persons? For example: <ul style="list-style-type: none"> <li>○ Threats</li> <li>○ Traumatic experiences</li> <li>○ What was the role of the perpetrator in inflicting such measures on one or more persons?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• A doctor testifying that the authorities ordered them to terminate all the pregnancies of a certain religious group and that refusal to comply was punishable by death.</li> <li>• A victim testifying that every morning she was forced to take a pill which stopped her becoming pregnant.</li> <li>• Testimony from victims that they were subjected to rape over a sustained period of time within the context of sexual slavery.</li> <li>• Documents from health service providers indicating that they were required to report all pregnancies and inform the pregnant women about compulsory abortions.</li> <li>• The existence of health clinics established to carry out forced sterilisations against a particular group of people.</li> <li>• Videos or photographs showing that men and women of a particular ethnic group were segregated.</li> </ul>
<b>Does the evidence show that the measures imposed were intended to prevent births within that group?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrators intend to prevent births within the group through the imposed measures?</li> <li>• What were the mental and physical effects of the measures on the victims?</li> <li>• Did the imposed measures impair the reproductive capacity of the victims?</li> <li>• What were the effects of the measures on the group to which the victim belonged?</li> </ul>	<ul style="list-style-type: none"> <li>• Testimony from a trauma expert that the sustained rapes against women had caused them to be reluctant to procreate in the future.</li> <li>• Medical records of women indicating that they had been sterilised or subjected to forced abortions.</li> <li>• A physical assessment of the victim indicating that he had been castrated by the perpetrators.</li> <li>• Video or audio recordings of the perpetrator indicating that the intention behind the sexual violence imposed against men and women was to prevent them from procreating.</li> <li>• Media reports describing the widespread and systematic campaign of castration planned and put into action by the perpetrator targeting a particular ethnic group.</li> </ul>

Table 59: Article 6(d) Cues for Practitioners

### **3.2.52 Genocide by Forcibly Transferring Children (Article 2(e), Genocide Convention; Article 6(e), Rome Statute)**

Article 2(e) of the Genocide Convention and Article 6(e) of the Rome Statute prohibits genocide by forcibly transferring children belonging to a national, ethnic, racial or religious group to another group with the intent to destroy such group.<sup>1082</sup> This conduct is broadly covered by Article 442 of the Criminal Code of Ukraine ('CCU'), which includes genocide by "forceful transferring of children from one group to another".

Article 442 of the Criminal Code of Ukraine ('CCU') includes genocide by "forceful transferring of children from one group to another". In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the commission of genocide by "forcible transfer of children from one group to another" under Article 442.1(5) of the CCU.

This language covers the same conduct as "forcibly transferring children", as codified as an act of genocide under the Genocide Convention and the Rome Statute.

The elements of this crime are:<sup>1083</sup>

1. The perpetrator forcibly transferred one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

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<sup>1082</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 6(e). This prohibition is derived from the Genocide Convention and forms part of customary international law. See, *Genocide Convention*, Article 2(e); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 161. Genocide by forcibly transferring children is also prohibited by the following international instruments: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('ICTY Statute'), Article 4(e); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('ICTR Statute'), Article 2(2)(e); and UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 4.

<sup>1083</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 6(e).



### **3.2.52.1 Element One: The Perpetrator Forcibly Transferred One or More Persons**

The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.<sup>1084</sup> Indeed, it has been recognised that this provision sanctions both direct acts of forcible physical transfer, and “acts of threats or trauma which lead to the forcible transfer of children from one group to another”.<sup>1085</sup>

### **3.2.52.2 Element Four: The Transfer was from a Protected Group to Another Group**

This element requires practitioners to seek information demonstrating that the persons were from a protected group (i.e., a national, ethnical, racial or religious group) and they were transferred to another group. Accordingly, transfers done within the same group fall outside the scope of this prohibition.

### **3.2.52.3 Element Five: The Person(s) Were Under the Age of 18 Years**

Practitioners also need to establish that the forcibly transferred persons were under the age of 18 years.

### **3.2.52.4 Element Six: The Perpetrator Knew, or Should Have Known, That the Person or Persons Were Under the Age of 18 Years**

This element requires that the perpetrator knew or should have known that the transferred persons were under the age of eighteen years. Even if the perpetrator did not have actual knowledge about the victim’s age, they may still be liable for this crime if it can be established that they “should have known” the victims were underage.<sup>1086</sup> This can be established if, for example, the perpetrator lacked actual knowledge because they did not act with sufficient diligence in the relevant circumstances.<sup>1087</sup> In this sense, the burden is on the perpetrator to ascertain the age of the persons they forcibly transfer.<sup>1088</sup> A consistent pattern of forcibly transferring children under the age of 18 is sufficient to give perpetrators notice that there is a significant probability that the victim was under the age of 18.<sup>1089</sup>

### **3.2.52.5 General Contextual and Mental Elements**

Finally, practitioners should seek information establishing the general contextual element common to acts of genocide, as well as the mental elements under Article 30 (*see* Sections 3.1 and 3.3).

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<sup>1084</sup> ICC Elements of Crimes, Article 6(e) fn. 5; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (*‘Akayesu Trial Judgment’*), para. 509.

<sup>1085</sup> *Akayesu Trial Judgment*, para. 509; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment and Sentence, 6 December 1999 (*‘Rutaganda Judgment and Sentence’*), para. 54; *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 118.

<sup>1086</sup> *See, mutatis mutandis Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009 (*‘Sesay et al. Trial Judgment’*), para. 1704.

<sup>1087</sup> *See, mutatis mutandis Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 252.

<sup>1088</sup> *See, mutatis mutandis Sesay et al. Trial Judgment*, para. 1704.

<sup>1089</sup> *See, mutatis mutandis Sesay et al. Trial Judgment*, para. 1745.

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator forcibly transferred one or more persons?</b>	<ul style="list-style-type: none"> <li>• What circumstances surrounded the transfer?</li> <li>• Did the perpetrator physically transfer one or more persons?</li> <li>• Did the perpetrator transfer the person by using fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment?</li> <li>• How was the transfer carried out?</li> <li>• Did the perpetrator obtain the consent of the parents of the child in conducting the transfer? <ul style="list-style-type: none"> <li>◦ If yes, was this consent obtained through coercion?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that her son was taken from her and she did not see him again for years.</li> <li>• A victim testifying that when she was taken from her mother she tried to cling on to her mother's skirt, but the perpetrator pulled her away.</li> <li>• Images of the vehicles used for the forcible transfer of children from an area.</li> <li>• An interview broadcast on television in which the perpetrator explained that children whose family homes had been destroyed were transferred in buses and trains to another location.</li> <li>• Media reports indicating that the perpetrators abducted children from their homes and transferred them to another part of the country.</li> </ul>
<b>Does the evidence show that the persons were transferred from a protected group to another group?</b>	<ul style="list-style-type: none"> <li>• Did the child belong to a protected group?</li> <li>• What was their cultural, racial, religious or ethnic background?</li> <li>• Where was the victim transferred to?</li> <li>• Was the victim transferred to a group other than their own?</li> </ul>	<ul style="list-style-type: none"> <li>• A victim from one nationality testifying that he was abducted by the perpetrators when he was 10 years old after his village was burned down and was subsequently adopted a family from another nationality.</li> <li>• Official documents related to the adoption of children belonging to a particular ethnicity by families belonging to another.</li> <li>• Identification cards showing that the boy captured in a video was of a certain nationality.</li> <li>• International organisation reports detailing the systematic practice of the perpetrators to abduct and forcibly transfer children from their own racial group to another.</li> <li>• Satellite imagery of a convoy of vehicles with children inside crossing a border.</li> </ul>
<b>Does the evidence show that the persons were under the age of 18 years?</b>	<ul style="list-style-type: none"> <li>• How old were the victims who were forcibly transferred?</li> <li>• Does the victim have an ID card that indicates their age?</li> <li>• Does the appearance, physical characteristics or the manner of speaking of the victim indicate that they were under the age of 18 when they were forcibly transferred?</li> </ul>	<ul style="list-style-type: none"> <li>• Victims and their family members testifying that they were under 18 when they were forcibly transferred by the perpetrator</li> <li>• Identification documents belonging to the victim indicating their age.</li> <li>• An X-ray of the bones and teeth of the victims indicating their age at the time of their abduction.</li> <li>• A video showing a uniformed bodyguard who was shorter and appeared younger than others.</li> </ul>

		<ul style="list-style-type: none"> <li>• NGO reports prepared by conducting interviews with persons who were abducted by the perpetrators when they were under the age of 18.</li> </ul>
<p><b>Does the evidence show that the perpetrator knew, or should have known, that the person or persons were under the age of 18 years?</b></p>	<ul style="list-style-type: none"> <li>• Did the perpetrator know that the victims were in fact under the age of 18?</li> <li>• What are the indications of the fact that the perpetrator knew that the victims were under the age of 18?</li> <li>• Was it blatantly obvious from their physical appearance or behaviour that the victims were under the age of eighteen?</li> <li>• What steps, if any, did the perpetrator take to ensure that the persons who were transferred from a protected group to another were not under the age of 18?</li> <li>• Was there a consistent pattern of forcibly transferring persons under the age of 18 from a protected group to another group?</li> <li>• Was the issue of forcible transfer of persons under the age of 18 from a protected group to another ever brought to the attention of the perpetrator(s)?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they saw children being escorted out of an elementary school in an area where a particular ethnic group resides and placed in buses.</li> <li>• A video depicting the perpetrator participating in the removal of civilians, including many who visibly appear to be under the age of 18, from their homes and loading them onto busses.</li> <li>• Military records documenting the transfer of children under the age of 18 from one ethnic group to another.</li> <li>• A UN report documenting the widespread practice used by the perpetrators of transferring children of one religious group to families of another religious group.</li> </ul>

Table 60: Article 6(e) Cues for Practitioners

### 3.2.53 The Crime of Aggression (Article 8bis, Rome Statute)

The prohibition of aggression finds its origins in the prohibition against the use of force contained in the UN Charter.<sup>1090</sup> It is also generally accepted that the crime of aggression is a crime under customary international law.<sup>1091</sup>

The UN Charter was ratified by both Ukraine and Russia on 24 October 1945.<sup>1092</sup> The prohibition against the use of force is set out in Article 2(4) of the UN Charter and provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the

<sup>1090</sup> C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (CUP 2013) (‘McDougall, *The Crime of Aggression under the Rome Statute*’), pp. 34-35.

<sup>1091</sup> Y. Tan, *The Rome Statute as Evidence of Customary International Law* (Brill 2022), p. 190; I. Brownlie, *International Law and the Use of Force by States* (OUP 1981), pp. 185-194; Y. Dinstein, *War, Aggression and Self-Defence* (5<sup>th</sup> edn, CUP 2011); S. Glaser, ‘The Charter of the Nuremberg Tribunal and New Principles of International Law’ in Mattraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008), pp. 67-69; A.R. Coracini, ‘Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute’s Complementarity Regime’ in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009), p. 725; A. Cassese *et al.* (eds), *Cassese’s International Criminal Law* (3<sup>rd</sup> edn, OUP 2013), pp. 142-143.

<sup>1092</sup> ‘Status of Treaties: Charter of the United Nations’.

Purposes of the United Nations”.<sup>1093</sup> This prohibition relates to the conduct of States, and therefore relates to State responsibility.

The first codifications of the international *crime* of aggression resulting in individual criminal responsibility is contained in the 1945 Charter of the International Military Tribunal of Nuremberg (‘Nuremberg Charter’). Article 6(a) of the Nuremberg Charter proscribes ‘crimes against peace’, defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.<sup>1094</sup>

After decades of frustrated attempts to define the notion, on 14 December 1974, the United Nations General Assembly (‘UNGA’) adopted a definition of aggression in Resolution 3314 (XXIX) (‘Definition of Aggression’).<sup>1095</sup> According to Article 5(2) of the ‘Definition of Aggression’, “a war of aggression is a crime against international peace. Aggression gives rise to international responsibility”. In this regard, the ‘Definition of Aggression’ distinguishes between an *act* of aggression, which gives rise to international responsibility for States, and a *war* of aggression, which is a “crime against international peace”.<sup>1096</sup> However, since the ‘Definition of Aggression’ is contained in an Annex to a UNGA resolution, and given that UNGA resolutions are non-binding,<sup>1097</sup> it does not create legal obligations for States or individuals. The ‘Definition of Aggression’ has, however, been relied upon by the Ukrainian Supreme Court,<sup>1098</sup> and was replicated in the Rome Statute of the International Criminal Court (‘ICC’) to define the crime of aggression (*see below*, Section 3.2.53.3).

Article 1 of the ‘Definition of Aggression’ contains the following broad definition of aggression: “[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition”.<sup>1099</sup> As may be seen, the definition largely resembles Article 2(4) of the UN Charter, but for a few notable differences.<sup>1100</sup> Article 3 of the ‘Definition of Aggression’ provides a list of specific *acts* of aggression. As discussed below (*see* Section 3.2.53.3), this list is replicated in the Rome Statute.

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<sup>1093</sup> *Charter of the United Nations* (24 October 1945) 892 UNTS 119 (‘UN Charter’), Article 2(4).

<sup>1094</sup> Nuremberg Charter, Article 6(a).

<sup>1095</sup> UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974).

<sup>1096</sup> UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974), Article 5(2). *See*, Dinstein, ‘Aggression’ (MPEPIL 2015), para. 13.

<sup>1097</sup> *See*, UN Charter, Article 10: “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters” (emphasis added).

<sup>1098</sup> *See e.g.*, Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

<sup>1099</sup> UNGA Resolution 3314 (XXIX). Definition of Aggression (14 December 1974), Article 1.

<sup>1100</sup> *See*, Y. Dinstein, ‘Aggression’ (MPEPIL 2015), para. 16: “But a comparison between the two texts shows that there are a number of variations: (i) the mere threat of force is excluded; (ii) the adjective ‘armed’ is interposed before the noun ‘force’; (iii) ‘sovereignty’ is mentioned together with the territorial integrity and the political independence of the victim State; (iv) the victim is described as ‘another’ rather than ‘any’ State; (v) the use of force is forbidden whenever it is inconsistent with the UN Charter as a whole, and not only with the Purposes of the UN; (vi) a linkage is created with the rest of the Definition of Aggression. Some of these points are of peripheral significance, others are of greater consequence.”

The most recent codification of the crime of aggression is contained in the Rome Statute.<sup>1101</sup> During the Review Conference, held in Kampala in 2010, the crime of aggression was included in the Rome Statute under Article 8*bis* (i.e., the Kampala amendments).<sup>1102</sup> However, **for those States who accept the amendment**, the amendment only enters into force one year after they express such formal acceptance.<sup>1103</sup> After the required number of States ratified the amendment, the jurisdiction of the ICC over the crime of aggression was triggered on 17 July 2018.<sup>1104</sup> So far 43 States Parties have ratified the Kampala amendment.<sup>1105</sup>

While Ukraine has submitted two declarations to the ICC granting the Court jurisdiction over crimes committed on its territory from 21 November 2013,<sup>1106</sup> these declarations do not extend the ICC's jurisdiction to the crime of aggression. In any event, Russia is not a State Party to the Rome Statute (and has therefore not accepted the amendment), so the ICC is barred from exercising jurisdiction over the crime of aggression committed by Russian nationals,<sup>1107</sup> regardless of whether the Court has jurisdiction over other international crimes committed on the territory of Ukraine.

Nonetheless, the Rome Statute and the accompanying ICC Elements of Crimes now provide useful guidance on the definition, interpretation and application of the crime of aggression. Article 8*bis* of the Rome Statute defines the crime of aggression as the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.<sup>1108</sup> As may be seen, the Rome Statute's definition of the crime of aggression contains a leadership criterion.<sup>1109</sup> This means that the crime can only be perpetrated by “a person who is in a position effectively to exercise control over or to direct the political or military action of a State” (*see* Section 3.2.53.2).<sup>1110</sup>

Article 8*bis*(2) sets out the definition of an act of aggression which means “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”. Article 8*bis*(2)(a)-(g) set out

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<sup>1101</sup> *See*, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 8*bis*.

<sup>1102</sup> ICC, Resolution RC/Res.6, 'The Crime of Aggression' (11 June 2010).

<sup>1103</sup> Rome Statute, Article 121(5): “[i]n respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory”.

<sup>1104</sup> ICC, Resolution ICC-ASP/16/Res.5, 'Activation of the Jurisdiction of the Court over the Crime of Aggression' (14 December 2017), para. 1.

<sup>1105</sup> The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, 'Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression: Update No. 36 (information as of 3 February 2022)'.

<sup>1106</sup> Declaration of the Verkhovna Rada of Ukraine 'On the Recognition of the Jurisdiction of the International Criminal Court' of 9 April 2014. The declaration is lodged by Ukraine under Article 12(3) of the Rome Statute.

<sup>1107</sup> Rome Statute, Article 15*bis* (5).

<sup>1108</sup> Rome Statute, Article 8*bis* (1).

<sup>1109</sup> International Criminal Court ('ICC'), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 ('ICC Elements of Crimes'), Article 8*bis*, Element 2.

<sup>1110</sup> ICC Elements of Crimes Article 8*bis*, Element 2.



the *acts of aggression*.<sup>1111</sup> This definition replicates the definition contained in the UNGA's 'Definition of Aggression'. Under the Rome Statute, the elements of Article 8*bis* are as follows:

1. The perpetrator planned, prepared, initiated or executed an act of aggression;
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression;
3. The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed;
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations;
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations; and
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

Aggression is criminalised by Article 437 of the Criminal Code of Ukraine ('CCU'), which prohibits the "[p]lanning, preparation and waging of an aggressive war". The article reads as follows:<sup>1112</sup>

1. Planning, preparation or initiation of an aggressive war or armed conflict, or conspiring for any such purposes, - shall be punishable by imprisonment for a term of seven to twelve years.
2. Waging an aggressive war or aggressive hostilities, - shall be punishable by imprisonment for a term of ten to fifteen years.

The CCU does not specify the precise elements of either of these crimes, and the practice in Ukraine relating to this crime has been uneven and often contradictory. Nonetheless, as will be discussed in more detail below, Article 437 covers similar conduct to that prohibited by the international crime of aggression, albeit with some critical differences.

More specifically, analysis of Ukrainian jurisprudence under Article 437 reveals a practice of relying on international definitions of the crime of aggression to delineate the parameters of the offence. Notably, Ukrainian Courts have relied on international instruments to interpret Article 437 on several occasions, including the UNGA's 'Definition of Aggression',<sup>1113</sup> the Nuremburg Principles<sup>1114</sup> and the Rome Statute.<sup>1115</sup>

### ***3.2.53.1 Comparison Between Article 437 of the Criminal Code of Ukraine and International Definitions of the Crime of Aggression***

Although Article 437 of the CCU does not set out the elements of the crime of aggression under Ukrainian law, the text of the article and the practice of Ukrainian Courts reveals that it covers similar conduct to that prohibited by the international crime of aggression, albeit with some critical differences. Consequently, as will be discussed, the elaboration of the elements of the crime of

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<sup>1111</sup> UNGA Resolution 3314 (XXIX): 'Definition of Aggression' (14 December 1974).

<sup>1112</sup> Criminal Code of Ukraine of 5 April 2001 No. 2341-III ('CCU'), Article 437.

<sup>1113</sup> Resolution of Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021; Judgment of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

<sup>1114</sup> Judgment of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

<sup>1115</sup> Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022.



aggression under international law (*see* Section 3.2.53.2), are directly relevant as an interpretative tool for Article 437.

In this respect, there are three main aspects to consider: (i) the conduct that can amount to the crime of aggression; (ii) the definition of aggression; and (iii) who can be held responsible for an act of aggression.

#### 3.2.53.1.1 *The Conduct Capable of Attracting Criminal Responsibility*

Taken together, both paragraphs of Article 437 criminalize the following conduct:

- (i) The **planning** of an aggressive war or armed conflict;
- (ii) The **preparation** of an aggressive war or armed conflict;
- (iii) The **initiation** of an aggressive war or armed conflict;
- (iv) **Conspiring** for the planning, preparation or initiation of an aggressive war or armed conflict; and
- (v) **Waging** an aggressive war or aggressive hostilities.

This sets out the same conduct as that contained in the Nuremberg Charter, which includes “planning, preparation, initiation or waging” and “participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.<sup>1116</sup> The Charter of the International Military Tribunal for the Far East and the 1950 Nuremberg Principles followed this definition.<sup>1117</sup> Similarly, the Rome Statute includes “planning, preparation, initiation or execution”.<sup>1118</sup> Although the Rome Statute does not specify conspiracy, such conduct would be covered by the modes of liability set out in the Rome Statute (*see* Section 3.4).<sup>1119</sup>

Article 437 contains no further explanation as to the interpretation of the type of conduct capable of attracting criminal responsibility. However, Ukrainian jurisprudence provides some guidance.

In Case No. 235/89/16-k of 6 March 2018, the Court held that the material elements of the offences set out in Article 437 would include management actions for the implementation of aggressive plans, in particular, general management of all forces involved in war or military conflict, management of armed forces or military operations, etc.<sup>1120</sup> After the aggressive war has already been initiated, an individual may still be held responsible under Article 437 for changing the existing plans or formulating new plans for the ongoing conflict, or planning additional military action.<sup>1121</sup>

In another case, the Svativ District Court in the Luhansk region acquitted the accused as there was no evidence that they took managerial actions for the implementation of aggressive plans, took leadership over the armed forces involved in the conflict, conducted military operations, made

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<sup>1116</sup> Nuremberg Charter, Article 5(a).

<sup>1117</sup> Tokyo Charter, Article 6(a); Nuremberg Principles, Principle VI(a).

<sup>1118</sup> Rome Statute, Article 8*bis* (1).

<sup>1119</sup> Rome Statute, Article 25.

<sup>1120</sup> Resolution of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

<sup>1121</sup> Resolution of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

changes to the plan of war or military conflict, or created plans for military action.<sup>1122</sup> In other words, to find an accused responsible for the crime of aggression under Article 437, it must be established that they engaged in one of these activities.

Additional guidance can be found in the Resolution in Case No. 235/89/16-k, where the Donetsk Court of Appeal upheld the acquittal of a Russian citizen accused under Article 437(2) (*waging* an aggressive war) for carrying out food preparation tasks at checkpoints of the illegal armed formations of the Donetsk People's Republic.<sup>1123</sup> In contrast, in a separate case, the Donetsk Court of Appeal upheld the guilty verdicts of two persons under Article 437(2) who, based on prior conspiracy, joined an illegal armed formation where they served as tank crew members.<sup>1124</sup> The Court held that the actions of the defendants aimed at storing the tank, keeping it in good condition, and being ready to repel a Ukrainian attack as part of an illegal armed formation indicate that they committed actions related to waging an aggressive war.<sup>1125</sup> As mentioned below, however, the latter decision is incompatible with the international crime of aggression, which can only be committed by those in leadership positions (*see* Section 3.2.53.2.2).<sup>1126</sup>

In the absence of further jurisprudence, and to aid further understanding of the conduct which gives rise to the crime of aggression, prosecutors may turn to the practice of international instruments and institutions to determine which type of conduct may be criminalised under Article 437 (*see* Section 3.2.53.2).

#### 3.2.53.1.2 The Definition of Aggressive War/Act of Aggression

Second, while Article 437 does not define “aggressive war” or “aggressive hostilities”, analysis of Ukrainian law and practice reveals the incorporation of international definitions of aggression. In particular, Article 1 of the Law of Ukraine “On Defense of Ukraine”, which offers a definition aggression in the context of the use of force, and the jurisprudence of Ukrainian Courts relating to the crime of aggression confirms that the UNGA’s ‘Definition of Aggression’ (and by extension the Rome Statute’s definition, which replicates this definition in its entirety) are applicable.

As discussed previously, both the ‘Definition of Aggression’ and the Rome Statute define aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations”.<sup>1127</sup> Both definitions contain a non-exhaustive list of acts which qualify as acts of aggression.<sup>1128</sup>

To begin with, the definition of ‘armed aggression against Ukraine’ provided in Article 1 of the Law of Ukraine “On Defense of Ukraine” includes all acts listed in subparagraphs (a) to (g) of the UNGA’s

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<sup>1122</sup> Order of Svativ District Court, Case No. 642/6196/17, 29 October 2020.

<sup>1123</sup> Resolution of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

<sup>1124</sup> Resolution of Donetsk Region Appeal Court (Mariupol), Case No. 263/15014/15-k, 16 May 2018.

<sup>1125</sup> Resolution of Donetsk Region Appeal Court (Mariupol), Case No. 263/15014/15-k, 16 May 2018.

<sup>1126</sup> Rome Statute, Article 8*bis*; ICC Elements of Crimes, Article 8*bis*, Element 2.

<sup>1127</sup> UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974), Article 1; Rome Statute, Article 8*bis*(2).

<sup>1128</sup> UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974), Article 3(a)-(g); Rome Statute, Article 8*bis*(2)(a)-(g).

‘Definition of Aggression’.<sup>1129</sup> The only difference is that the Ukrainian definition is phrased as though the respective acts were being carried out against Ukraine.

In addition, Ukrainian courts have also recognised international definitions of aggression. In the trial of former Ukrainian President Viktor Yanukovich under Article 437, the Court referred to and relied upon the UNGA’s ‘Definition of Aggression’.<sup>1130</sup> In another case, the Obolonskyi District Court of Kyiv qualified Russia’s act of aggression against Ukraine by referring to the acts of aggression listed in Article 3 of the ‘Definition of Aggression’.<sup>1131</sup> In the same case, the Court referred to the ‘Nuremberg Principles’<sup>1132</sup> in finding that the aggressive element of a war can be manifested in the goal of the state that started the war to occupy or conquer the territory of another state, in its entirety or in part.<sup>1133</sup>

Crucially, Ukrainian jurisprudence has emphasised that the concepts of “aggression” and “aggressive war” are not identical. Specifically, this jurisprudence has established that aggressive war is a type of aggression, and that aggressive war is distinguished by the scale of actions, the combination of the use of armed force with other means (economic, diplomatic, ideological, informational), and the formulation and implementation of certain political tasks, in particular, the occupation of part of the territory of a sovereign State.<sup>1134</sup> This approach mirrors the ‘Definition of Aggression’, which specifies that “[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility”.<sup>1135</sup> Similarly, under the Rome Statute, in order to amount to the *crime* of aggression, the *act* of aggression must, by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations.<sup>1136</sup> In other words, whereas all *acts* of aggression will lead to State responsibility under international law, a minimum level of gravity is required to trigger individual criminal responsibility under both Article 437 and international law.

In sum, although Article 437 does not contain a definition of “aggressive war”, the jurisprudence indicates that it can be interpreted in line with the UNGA’s ‘Definition of Aggression’ (and therefore Article 8*bis* of the Rome Statute, which replicates the ‘Definition of Aggression’). Accordingly, the

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<sup>1129</sup> Law of Ukraine “On Defense of Ukraine” of 6 December 1991 No. 1932-XII, Article 1. Note, the differences in wording exist because the Ukrainian law definition is with respect to acts of aggression “against Ukraine”. The law therefore describes the examples of acts of aggression as if they were being carried out against Ukraine. For instance, with respect to the first category of aggression: (i) Law of Ukraine “On Defense of Ukraine”: “invasion or attack of armed forces of other states or group of the states *on the territory of Ukraine*, and also occupation or annexation of part *of the territory of Ukraine*” (emphasis added); (ii) UNGA Definition: “(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof”.

<sup>1130</sup> UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974), Article 3; Resolution of Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021.

<sup>1131</sup> Judgment of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

<sup>1132</sup> UN General Assembly Resolution No. 95(I) “Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal” of 11 December 1946.

<sup>1133</sup> Judgment of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

<sup>1134</sup> Resolution of Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021; Judgment of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

<sup>1135</sup> UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974), Article 5(2).

<sup>1136</sup> ICC Elements of Crimes, Article 8*bis*, Element 5.

practice of international instruments and institutions, referred to below (*see* Section 3.2.53.2), in defining aggression can be used as an interpretive tool to clarify Article 437.

### 3.2.53.1.3 *The Role of the Perpetrator (Leadership Requirement)*

As discussed above, the international crime of aggression contains a leadership requirement. According to the Rome Statute, the international crime of aggression can only be perpetrated by “a person who is in a position effectively to exercise control over or to direct the political or military action of a State which committed the act of aggression”.<sup>1137</sup> This element was also established in the jurisprudence of the Nuremberg Tribunal (*see* Section 3.2.53.2.2).<sup>1138</sup>

However, the text of Article 347 contains no such requirement, and on first reading, it appears as though any person can be held responsible for planning, preparing or initiating an aggressive war under the CCU, including low-ranking officials and even foot soldiers. The absence of this leadership requirement raises questions as to the compatibility of Article 347 with international standards.

Ukrainian jurisprudence remains unsettled on the matter. The Order of the Supreme Court in Case No. 415/2182/20 considered both offences set out in Article 437 and concluded that the question surrounding whether those who actually control the political and military actions of State can be subject to Article 47 is an extraordinary legal issue which should be determined by the Grand Chamber of the Supreme Court.<sup>1139</sup> The Supreme Court recognised that there was ambiguous application of Article 437 in the judicial practice of the courts of first and appellant instances due to the vagueness of Article 437, which has a negative effect on the principle of legal certainty requiring its referral to the Grand Chamber of the Supreme Court.<sup>1140</sup> The Grand Chamber is yet to rule on this issue.

According to the Supreme Court Order, while the provisions of Article 437 do not contain any restriction or additional features relating to the subject of the criminal offence, it may be argued that in practice only a person who is actually able to exercise control over the political or military actions of a state can commit the crime.<sup>1141</sup> This argument is based on the following considerations:

- (i) The material elements of Article 437 – “planning”, “preparing”, “initiating”, or “waging” an aggressive war – are inextricably linked with the leadership nature of the crime; and
- (ii) Extending the scope of the crime beyond those in leadership positions would be incompatible with the international formulation of the offence, and thus in violation of the principle of certainty in criminal law.<sup>1142</sup>

As noted by the Supreme Court, however, Ukrainian courts have applied Article 437 unevenly in practice. In some cases, courts have held that the objective elements of the crime (planning,

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<sup>1137</sup> Rome Statute, Article 8*bis*; ICC Elements of Crimes, Article 8*bis*, Element 2.

<sup>1138</sup> International Law Commission, ‘Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, with commentaries’ (1950), para. 117.

<sup>1139</sup> Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

<sup>1140</sup> Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

<sup>1141</sup> Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

<sup>1142</sup> *See* below, Section 3.2.53.2.2.

preparing, initiating or waging an aggressive war) can only be carried out by an official of the armed forces or other military formations, as well as a high-level State authority which, by virtue of its powers, is capable of carrying out the relevant act.<sup>1143</sup> This approach is largely consistent with international practice, as discussed below (*see* Section 3.2.53.2.2).

On the other hand, there is a pattern of ordinary soldiers and lower-level commanders being convicted for the crime of waging an aggressive war under Article 437(2) of the CCU.<sup>1144</sup> As an example, in its decision in Case No. 263/1504/15-k, the Donetsk Court of Appeal left unchanged the guilty verdicts against two persons convicted under Article 437(2). The convicted individuals joined an illegal armed formation and served as members of a tank crew, where they kept and maintained the tank for the purpose of repelling any potential attack by the Ukrainian armed forces.<sup>1145</sup>

In addition to being incompatible with international practice, and therefore in violation of the principle of certainty in criminal law,<sup>1146</sup> this approach raises several concerns. First, the sentence prescribed under paragraph 2 of Article 437 (i.e., lower-level commanders waging an aggressive war) is *higher* than that prescribed under paragraph 1 (i.e., leadership involved in planning, preparing and initiating).<sup>1147</sup> Such a result contradicts the fundamental principle of criminal law that punishment shall be commensurate with the character and gravity of the crime.<sup>1148</sup>

Second, this approach is contrary to the principle of combatant immunity, which bars the prosecution of combatants for merely participating in hostilities.<sup>1149</sup> Indeed, an important aspect of the leadership element of the international crime of aggression is that it protects the principle of combatant immunity.<sup>1150</sup> In the context of aggressive wars, ordinary soldiers on the side of the aggressive State benefit from immunity from prosecution provided that they comply with international humanitarian law ('IHL'), meaning they can be prosecuted for violations of IHL, but not their participation in combat.<sup>1151</sup> The principle of combatant immunity is an important barrier to the prosecution of ordinary soldiers for the crime of aggression under Article 437, even in the absence of a codified leadership requirement.

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<sup>1143</sup> Resolution of Dnipro Court of Appeal, Case No. 426/1211/17, 24 January 2022; Order of Svativ District Court, Case No. 642/6196/17, 29 October 2020; Resolution of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

<sup>1144</sup> Judgment of Artemivsk City District Court of the Donetsk region, Case No. 219/10228/15-к, 22 August 2019; Judgement of Illichivsk District Court of Mariupol, Donetsk region, Case No. 221/2405/15-к, 24 November 2017; Judgment of Bilokurakynye District Court of the Luhansk region, Case No. 409/2799/16-к, 13 December 2016.

<sup>1145</sup> Judgment of Bilokurakynye District Court of the Luhansk region, Case No. 409/2799/16-к, 13 December 2016.

<sup>1146</sup> See below, Section 3.2.53.2.2.

<sup>1147</sup> CCU, Article 437. The prescribed sentence under paragraph 1 is seven to ten years, whereas the prescribed sentence under paragraph 2 is ten to fifteen years.

<sup>1148</sup> See, *Prosecutor v. Todorović*, IT-95-9/1-S, *Sentencing Judgment*, 31 July 2001, para. 29.

<sup>1149</sup> Additional Protocol I, Article 43(2): "Members of the armed forces of a Party to a conflict [...] are combatants, that is to say, they have the right to participate directly in hostilities". See also ICRC, 'Immunities', *How Does Law Protect in War*.

<sup>1150</sup> T. Dannenbaum, 'The Criminalization of Aggression and Soldiers' Rights' 29 *European Journal of International Law* 859, p. 868.

<sup>1151</sup> First Geneva Convention, Article 2: "the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties". See also Second Geneva Convention, Article 2; Third Geneva Convention, Article 2; Fourth Geneva Convention, Article 2; M. Jackson and D. Akande, 'The right to life and the *jus ad bellum*: belligerent equality and the duty to prosecute acts of aggression' (2022) 71(2) *International and Comparative Law Quarterly* 453, p. 455.



In conclusion, the test of Article 347 is not in itself incompatible with international instruments defining aggression. However, the lack of a leadership requirement has led to uneven practice. The Grand Chamber of the Supreme Court has been requested, but if yet to issue, a ruling regarding whether aggression can only be committed by those who are able to exercise control over the political or military actions of a state – meaning that the leadership requirement is an element of the crime of aggression under Article 437.

With the exception of the leadership requirement which is yet to be decided under Ukrainian law, Article 437 is substantially similar to and has been interpreted in line with international definitions. Prosecutors can therefore turn to international instruments and jurisprudence to aid their interpretation.

### 3.2.53.2 *Elements of the Crime of Aggression under International Law*

#### 3.2.53.2.1 *Element One: The Perpetrator Planned, Prepared, Initiated or Executed an Act of Aggression*

To establish that the *crime* of aggression has occurred, practitioners must first seek information that the perpetrator planned, prepared, initiated or executed an *act* of aggression.<sup>1152</sup>

Upon first reading, it may seem as if the inclusion of the terms ‘planning’ and ‘preparation’ mean that a perpetrator can be held responsible for the crime of aggression even if the act of aggression itself is not carried out, this would be incompatible with Element Three (see Section 3.2.53.3, below), which requires that “[t]he act of aggression [...] was committed”.<sup>1153</sup>

While the jurisprudence of the Nuremberg Tribunal did not explain whether the positive actions of the accused fell within the categories of ‘planning’, ‘preparing’, ‘initiating’ or ‘waging’ a war of aggression,<sup>1154</sup> the Tribunal did identify the conduct of each accused that led to their individual criminal responsibility. Accordingly, the jurisprudence of the Nuremberg Tribunal can provide some guidance as to the type of individual conduct which can lead to criminal responsibility for the crime of aggression.

- **‘Planning’** refers to the individual’s participation in the planning of the act of aggression, which ultimately must take place for the first element to be satisfied.<sup>1155</sup> Planning could involve, for example, participation in meetings in which plans for the use of force are formulated,<sup>1156</sup> or involvement in the planning of military operations.<sup>1157</sup>

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<sup>1152</sup> ICC Elements of Crimes, Article 8bis, Element 1. See also, Nuremberg Charter, Article 5(a); Tokyo Charter, Article 6(a); Nuremberg Principles, Principle VI(a).

<sup>1153</sup> ICC Elements of Crimes, Article 8bis, Element 3. See also W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2<sup>nd</sup> edn, OUP 2016) (‘Schabas, ICC Commentary’), p. 308.

<sup>1154</sup> C. McDougall, ‘The Crimes Against Peace Precedent’ in C. Kress, *The Crime of Aggression: A Commentary* (CUP 2017) (‘Kress, *The Crime of Aggression*’), p. 85.

<sup>1155</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (‘Triffterer & Ambos, *Commentary*’), pp. 588-589.

<sup>1156</sup> C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (CUP 2013) (‘McDougall, *Crime of Aggression under the Rome Statute*’), p. 187.

<sup>1157</sup> See, IMT Nuremberg, *Judgment of 1 October 1946*, pp. 122-123, where the tribunal found Funk responsible for crimes against peace for “participat[ing] in the economic preparation for certain of the aggressive wars”.



- **‘Preparation’** refers to the taking of concrete steps to implement the plan.<sup>1158</sup> This could involve a range of activities such as facilitating the necessary economic or military capacities, including acquiring weapons, readying troops at the border or liquidating assets to fund a war.<sup>1159</sup> Preparation could also take the form of political or diplomatic activities, such as establishing military alliances or concealing the State’s aggressive intentions in multilateral fora to gain a military advantage.<sup>1160</sup> Jurisprudence of the Nuremberg Tribunal indicates that economic preparation alone is sufficient to lead to a conviction for the crime of aggression.<sup>1161</sup>
- **‘Initiation’** refers to the actual commencement of the use of armed force, in one of the manners described in paragraph 2 of Article 8bis of the Rome Statute,<sup>1162</sup> and **‘execution’** covers all acts carried out to advance the act of aggression after it has formally commenced.<sup>1163</sup>
- The jurisprudence of the Nuremberg Tribunal indicates that **‘waging’** an aggressive war, like ‘execution’ under the Rome Statute, consists of actions taken after the initiation of the hostilities.<sup>1164</sup> In this regard, the Nuremberg Tribunal found an accused responsible for “the formulation and execution of occupation policies in the Occupied Eastern Territories”.<sup>1165</sup> ‘Execution’ therefore appears to cover acts such as the establishment of occupation authorities, and the governing of territory occupied as a result of an aggressive war.<sup>1166</sup>

### 3.2.53.2.2 *Element Two: The Perpetrator was a Person in a Position Effectively to Exercise Control over or to Direct the Political or Military Action of the State which Committed the Act of Aggression*

As discussed above, there has been uneven practice in the Ukrainian courts regarding whether the crime of aggression can only be committed by those who are able to exercise control over the political or military actions of a State. While the Grand Chamber of the Supreme Court is yet to make a ruling on this issue, who can be a subject of Article 437 remains unclear.

However, pursuant to international criminal law definitions, the crime of aggression contains a ‘leadership requirement’, meaning it only applies to “a person who is in a position effectively to exercise control over or to direct the political or military action of a State which committed the act of aggression”.<sup>1167</sup> According to the International Law Commission’s commentary to the Nuremberg Principles, this element was established in the jurisprudence of the Nuremberg Tribunal: “The Commission understands the expression [“waging” an aggressive war] to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the

<sup>1158</sup> M. Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959), p. 455; Triffterer & Ambos, *Commentary*, p. 589.

<sup>1159</sup> McDougall, *Crime of Aggression under the Rome Statute*, p. 187. See also, IMT Nuremberg, Judgment of 1 October 1946, pp. 108-109.

<sup>1160</sup> McDougall, *Crime of Aggression under the Rome Statute*, p. 187.

<sup>1161</sup> See, IMT Nuremberg, Judgment of 1 October 1946, pp. 122-123, where the tribunal found Funk responsible for crimes against peace for “participat[ing] in the economic preparation for certain of the aggressive wars”.

<sup>1162</sup> Rome Statute, Article 8bis(2); Triffterer & Ambos, *Commentary*, p. 590.

<sup>1163</sup> Triffterer & Ambos, *Commentary*, p. 590.

<sup>1164</sup> McDougall, ‘The Crimes Against Peace Precedent’ in Kress, *The Crime of Aggression*, p. 86.

<sup>1165</sup> IMT Nuremberg, Judgment of 1 October 1946, p. 114.

<sup>1166</sup> IMT Nuremberg, Judgment of 1 October 1946, p. 143.

<sup>1167</sup> Rome Statute, Article 8bis(1); ICC Elements of Crimes, Article 8bis, Element 2.

tribunal”.<sup>1168</sup> Accordingly, practitioners should consider whether the perpetrator is “a person who is in a position effectively to exercise control over or to direct the political or military action of a State which committed the act of aggression”.<sup>1169</sup> Multiple people within the leadership hierarchy of a State may meet these criteria.<sup>1170</sup>

This includes, at the very least, heads of State and government, ministers of defence and other military leaders, such as high-level commanders and generals, and may also include individuals who may qualify as exercising such control or direction.<sup>1171</sup> For example, the Nuremberg Tribunal rejected the defendant’s arguments that Hitler’s complete dictatorship absolved all others of responsibility.<sup>1172</sup>

The use of the term ‘effectively’ signifies that what matters is the factual (*de facto*) capability of the perpetrator rather than their formal (*de jure*) rank or title.<sup>1173</sup> This means that heads of State who perform only ceremonial functions, and who are unable to participate in the decision-making process behind the act of aggression, cannot be held responsible for the crime.<sup>1174</sup> In practice, in order to establish whether an individual may be held responsible for the crime of aggression, legal title alone is not necessarily determinative. Practitioners must analyse the role the individual plays in the decision-making process in practice, before determining whether the level of control/influence they can exert is sufficient.

Additionally, the leadership clause is not applied only to principal perpetrators, but also to accessories. Therefore, persons that participate in the crime of aggression in a less direct manner, such as through aiding and abetting (*see* Section 3.4), will only be held responsible for this offence if they too fulfil the leadership requirement.<sup>1175</sup>

### 3.2.53.2.3 *Element Three: The Act of Aggression was Committed*

This element requires practitioners to establish that the act of aggression actually took place, namely “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.<sup>1176</sup> The definition of aggression, and the acts which qualify as acts of aggression, contained in Article 8*bis*(2) of the Rome Statute<sup>1177</sup> replicates the definition contained in UNGA’s ‘Definition of Aggression’.<sup>1178</sup> Ukrainian Courts have relied upon this interpretation when defining “aggressive war”

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<sup>1168</sup> ILC, ‘Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, with commentaries’ (1950), para. 117.

<sup>1169</sup> Rome Statute, Article 8*bis*(1); ICC Elements of Crimes, Article 8*bis*, Element 2.

<sup>1170</sup> ICC Elements of Crimes, fn. 75.

<sup>1171</sup> Triffterer & Ambos, *Commentary*, p. 591.

<sup>1172</sup> IMT Nuremberg, Judgment of 1 October 1946, pp. 57-58.

<sup>1173</sup> Triffterer & Ambos, *Commentary*, p. 591.

<sup>1174</sup> Triffterer & Ambos, *Commentary*, p. 591.

<sup>1175</sup> Rome Statute, Article 25 (3*bis*).

<sup>1176</sup> Rome Statute, Article 8*bis* (2); ICC Elements of Crimes, Article 8*bis*, element 3; UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974), Article 1.

<sup>1177</sup> Rome Statute, Article 8*bis*(2); ICC Elements of Crimes, Article 8*bis*, Introduction, para. 1.

<sup>1178</sup> UNGA Resolution 3314 (XXIX). Definition of Aggression (14 December 1974), Article 3.

under Article 347.<sup>1179</sup> In effect, this element means that individuals cannot be prosecuted for attempted aggression.<sup>1180</sup>

In order to establish whether an ‘act of aggression’ has taken place, practitioners must first turn to paragraph 2 of Article 8*bis* of the Rome Statute, which provides the following definition:

**Rome Statute, Article 8*bis***

[...]

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
  - a. The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
  - b. Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
  - c. The blockade of the ports or coasts of a State by the armed forces of another State;
  - d. An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
  - e. The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
  - f. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
  - g. The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The term “**use of armed force**” means that only *armed* force, and not, for instance, political or economic force, can amount to an act of aggression.<sup>1181</sup> This definition is narrower in scope than Article 2(4) of the UN Charter, in that only the *use* of force would qualify, as opposed to *threats* of force, which are also prohibited by the UN Charter.<sup>1182</sup>

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<sup>1179</sup> See e.g., [Resolution](#) of Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021; [Judgment](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019; [Resolution](#) of Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021; [Judgment](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

<sup>1180</sup> Triffterer & Ambos, *Commentary*, p. 588.

<sup>1181</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2<sup>nd</sup> edn, OUP 2016) (“Schabas, *ICC Commentary*”), p. 314; Triffterer & Ambos, *Commentary*, p. 604.

<sup>1182</sup> Charter of the United Nations (adopted 26 June 1945 entry into force 24 October 1945, in accordance with article 110) 1 UNTS XVI (“UN Charter”), Article 2(4): “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. See, Triffterer & Ambos, *Commentary*, p. 604.

The definition also provides that the act of aggression must have been carried out “**by a State**”, meaning private actors cannot commit the crime of aggression.<sup>1183</sup> Whether a State can be held responsible for a use of force on the part of private actors will depend on whether the conduct of such actors is attributable to that State under the law of State responsibility.<sup>1184</sup> This means that the perpetrator was either ‘completely dependent’ upon, or operating under the ‘effective control’ of the State.<sup>1185</sup> If a non-state actor is involved, the first element will be satisfied if the information establishes that the non-state actor was either ‘completely dependent’ upon, or operating under the ‘effective control’ of, the State.<sup>1186</sup>

‘**Complete dependence**’ means that, although an actor might be legally separate from the State, in practice, they operate as an instrument of that State.<sup>1187</sup> It requires practitioners to look beyond the legal status of the entity and evaluate the practical reality of its relationship with the State, and whether they are “so closely attached as to appear to be nothing more than its agent”.<sup>1188</sup>

To establish ‘**effective control**’, practitioners must determine whether the State not only equipped and/or financed the non-state armed group and supervised its actions, but also provided specific instructions to that actor or exercised control over each operation in which the alleged violations occurred.<sup>1189</sup> In such circumstances, the use of armed force of a non-state armed group may constitute a “use of armed force by a State” under the first element of the crime of aggression. Indeed, as discussed below, such a scenario is accounted for in paragraph 2(g) of Article 8bis.

In addition, to constitute an act of aggression, practitioners must also establish that the use of armed force was directed against the **sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter**.<sup>1190</sup> The wording here is similar to the general international law prohibition against the use of force provided in Article 2(4) of the UN Charter.<sup>1191</sup> In effect, ‘territorial integrity’ and ‘political independence’ encompass any armed attack which impacts another State’s *de facto* control over its territory, or attempts to control

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<sup>1183</sup> S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Asser Press 2014), p. 260.

<sup>1184</sup> See, Triffterer & Ambos, *Commentary*, p. 605; ILC’ Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

<sup>1185</sup> ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Articles 4 and 8; *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, I.C.J. Reports 1946, p. 14 (‘*Nicaragua Judgment*’), paras 109, 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (‘*Bosnian Genocide Judgment*’), paras 391-393, 399-400, 406.

<sup>1186</sup> ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (‘*ARSIWA*’), Articles 4 and 8; *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, I.C.J. Reports 1946, p. 14 (‘*Nicaragua Judgment*’), paras 109, 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (‘*Bosnia Genocide Judgment*’), paras 391-393, 399-400, 406.

<sup>1187</sup> *Nicaragua Judgment*, 1986, para. 109; *Bosnian Genocide Judgment*, 2007, paras 391-393; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 4.

<sup>1188</sup> *Bosnian Genocide Judgment*, 2007, para. 205.

<sup>1189</sup> *Nicaragua Judgment*, para. 115; *Bosnia Genocide Judgment*, paras 399-400, 406; *ARSIWA*, Article 8.

<sup>1190</sup> Rome Statute, Article 8bis(2).

<sup>1191</sup> UN Charter, Article 2(4); Triffterer & Ambos, *Commentary*, pp. 605-606.

its organs and influence their capacity to decide.<sup>1192</sup> “In any other manner inconsistent with the Charter of the United Nations” means that a use of force may constitute an act of aggression if carried out in such a manner as to render it incompatible with the provisions of the Charter governing the use of force.<sup>1193</sup>

This means that practitioners must examine whether a State resorted to armed force as a legitimate exercise of self-defence under Article 51 of the UN Charter, or whether such a State used armed force pursuant to a Security Council authorisation under Chapter VII of the UN Charter. If the use of force satisfies either of these exceptions, it will not be considered an act of aggression:

1. **Self-defence:** the use of armed force by a State against another State will not constitute an act of aggression if carried out as a legitimate exercise of individual or collective self-defence under Article 51 of the UN Charter.<sup>1194</sup> According to international law, any use of force carried out in self-defence must be necessary in response to an attack, and proportionate (i.e., not excessive) in respect of that attack.<sup>1195</sup>
2. **Authorisation under Chapter VII:** the UN Security Council, acting under its Chapter VII powers, may authorise a use of force.<sup>1196</sup> The use of force by a State under such circumstances could not constitute an act of aggression.

Finally, practitioners should note that the list of “**any of the following acts**” provided in Article 8bis(2) of the Rome Statute and Article 3 of the ‘Definition of Aggression’ is not exhaustive.<sup>1197</sup> Indeed, the Definition of Aggression makes it clear that “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter”.<sup>1198</sup>

Each of the acts of aggression listed under Article 8bis(2) of the Rome Statute, and Article 3 of the ‘Definition of Aggression’ will be discussed, in turn, below.

#### 3.2.53.2.3.1 *Invasion or Attack by the Armed Forces of a State (Article 8bis(2)(a))*

The first listed act of aggression is “[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part

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<sup>1192</sup> S.K.N. Blay, ‘Territorial Integrity and Political Independence’ (MPIL March 2010), paras 8-9.

<sup>1193</sup> Triffterer & Ambos, *Commentary*, p. 607.

<sup>1194</sup> UN Charter, Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”.

<sup>1195</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 (*Armed Activities Judgment*), para. 147; *Nicaragua Judgment*, para. 176.

<sup>1196</sup> See e.g., UNSC Res. 1973 (17 March 2011), which authorised the use of force in Libya.

<sup>1197</sup> Report on the Special Committee on the Question of Defining Aggression, UN Doc. A/9619, pp. 23-24; Triffterer & Ambos, *Commentary*, p. 606; Schabas, *ICC Commentary*, pp 313-314.

<sup>1198</sup> UNGA Resolution 3314 (XXIX): ‘Definition of Aggression’ (14 December 1974), Article 4.



thereof". Russia's military attack on Ukraine commencing on 24 February 2014, is widely recognised to constitute such an act of aggression.<sup>1199</sup>

Situations of military occupation also fall within this category. As "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army".<sup>1200</sup> Notably, the Office of the Prosecutor of the ICC has concluded that the situation in Crimea amounts to one of occupation.<sup>1201</sup>

#### 3.2.53.2.3.2 *Bombardment or the Use of Any Weapons (Article 8bis(2)(b))*

The second listed act of aggression is "[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State". "Any weapons" does not distinguish between conventional weapons, weapons of mass destruction or any other kind of weapon.<sup>1202</sup> 'Bombardment' is "any attack from land, sea, or air bases with heavy weapons which, like artillery, missiles, or aircraft, are capable of destroying enemy targets at a greater distance beyond the battle lines".<sup>1203</sup>

#### 3.2.53.2.3.3 *Blockade of Ports or Coasts (Article 8bis(2)(c))*

The third listed act of aggression indicates that an act of aggression may take the form of "blockade of the ports or coasts of a State by the armed forces of another State". A 'blockade' is defined as "a belligerent operation to prevent vessels and/or aircraft of all nations, enemy and neutral, from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation".<sup>1204</sup> Israel's naval blockade against the Gaza strip provides an instructive example.<sup>1205</sup>

#### 3.2.53.2.3.4 *Attack on the Armed Forces (Article 8bis(2)(d))*

"An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" is another explicitly mentioned act of aggression under Article 8bis(2). This is distinguished from the listed act under subparagraph (2)(a) in that the attack need not occur on the territory of the attacked State.<sup>1206</sup> Accordingly, this provision covers attacks against a State's military positions abroad, including on disputed territory.<sup>1207</sup> For example, in the *Oil Platforms* case, the ICJ

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<sup>1199</sup> Permanent Mission of Ukraine to the United Nations in New York, 'Russian Aggression'; RULAC, 'International Armed Conflict in Ukraine'; C. Kreß (ed), *The Crime of Aggression: A Commentary* (CUP 2016) ("It is difficult to see how it could be denied that the Russian Federation's 2014 'bloodless invasion' of part of the territory of Ukraine attained the requisite gravity and scale"); Guardian, 'Russia G8 status at risk over 'incredible act of aggression' in Crimea, says Kerry' (2 March 2014).

<sup>1200</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 ('Hague Regulations'), Article 42. See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 78; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014, para. 1179; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 212.

<sup>1201</sup> ICC OTP, 'Report on Preliminary Examination Activities' (2016), para. 158.

<sup>1202</sup> Report of the Special Committee on the Question of Defining Aggression, UN Doc. A/9619, para. 20.1.

<sup>1203</sup> A. McDonald and T. Bruha, 'Bombardment' (MPIL 2011), para. 1.

<sup>1204</sup> W.H. von Heinegg, 'Blockade' (MPIL 2015), para. 1.

<sup>1205</sup> See, ICC OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014, paras 30-34.

<sup>1206</sup> Schabas, *ICC Commentary*, p. 316.

<sup>1207</sup> Triffterer & Ambos, *Commentary*, pp. 612-613.



determined that the mining of a single military vessel might constitute an armed attack giving rise to the inherent right of self-defence.<sup>1208</sup>

#### 3.2.53.2.3.5 *Violations of Conditions of Presence in a Territory (Article 8bis(2)(e))*

It is relatively common for the military forces of one State to be located on another State's territory as a result of a stationing agreement.<sup>1209</sup> Russia's stationing agreement with Ukraine, which granted Russia permission to station the Black Sea Fleet in Crimea, would be an example.<sup>1210</sup> According to subparagraph (2)(e), an act of aggression might occur where a State uses its armed forces present on another State's territory in contravention of the terms of such an agreement, or where such troops extend their presence on the territory of the receiving State after the expiration of the agreement.<sup>1211</sup> For example, in relation to the Black Sea Fleet Agreement, the European Court of Human Rights ('ECtHR') found that Russia had violated its terms by using its forces outside the parameters of the agreed deployment sites, and in contravention of the duty of cooperation provided for by the agreement.<sup>1212</sup>

#### 3.2.53.2.3.6 *Allowing Territory to be Used for an Act of Aggression (Article 8bis(2)(f))*

Article 8bis(2)(f) defines the following act of aggression: "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State". According to this provision, in a situation where a State consents to the presence of another State's troops on its territory, who then proceed to carry out an act of aggression against a third State, the consenting State may itself have committed an act of aggression.<sup>1213</sup> For example, Belarus has been accused of committing an act of aggression by allowing the Russian attack against Ukraine on 24 February to originate from its territory.<sup>1214</sup>

#### 3.2.53.2.3.7 *Sending Armed Bands, Groups, Irregulars, or Mercenaries (Article 8bis(2)(g))*

The final act of aggression listed in Article 8bis(2) is: "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

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<sup>1208</sup> Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003, p. 16 ('*Oil Platforms Judgment*'), para. 72.

<sup>1209</sup> Schabas, *ICC Commentary*, p. 316.

<sup>1210</sup> Schabas, *ICC Commentary*, p. 316. See also, *Ukraine v. Russia (re Crimea)*, Application Nos 20958/14 and 38334/18, Judgment, 14 January 2021 ('*Ukraine v. Russia (re Crimea)*'), paras 202-208.

<sup>1211</sup> Triffterer & Ambos, *Commentary*, pp. 613-614.

<sup>1212</sup> *Ukraine v. Russia (re Crimea)*, paras 325-327.

<sup>1213</sup> Schabas, *ICC Commentary*, p. 316.

<sup>1214</sup> See, N. Reetz, 'Belarus is Complicit in Russia's War of Aggression' (*EJIL:Talk!*, 1 March 2022).

3.2.53.2.4 Element Four: The Perpetrator was Aware of the Factual Circumstances that Established that such a Use of Armed Force was Inconsistent with the Charter of the United Nations

According to the ICC Elements of Crimes, “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of force was inconsistent with the Charter of the United Nations”.<sup>1215</sup> Practitioners should thus consider:<sup>1216</sup>

- Whether the use of force was directed against another State;
- Whether there was a relevant Security Council resolution and, if so, what it said; and
- Whether there was a prior or imminent attack by another State.

3.2.53.2.5 Element Five: The Act of Aggression, by its Character, Gravity and Scale, Constituted a Manifest Violation of the Charter of the United Nations

According to this element, the threshold necessary for the crime of aggression would not be met by border skirmishes or “mere frontier incidents”.<sup>1217</sup> To satisfy this element, practitioners should seek to demonstrate that the relevant act constitutes a clear violation of the UN Charter (i.e., that it was not a lawful exercise of self-defence or authorised by the UN Security Council), that it caused a high level of destruction and that it was temporally and/or geographically widespread.

3.2.53.2.6 Element Six: The Perpetrator was Aware of the Factual Circumstances that Established such a Manifest Violation of the Charter of the United Nations

As with Element Four, the ICC Elements of Crimes states that “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation of the [UN] Charter”.<sup>1218</sup> The drafters have noted that this element is necessary to account for situations where the perpetrator is aware of the facts establishing that the use of force amounts to an act of aggression, but is not aware of the facts that establish a manifest violation.<sup>1219</sup> This could occur where a perpetrator is aware of a movement of troops across a State border, but is unaware of the scale of the attack.<sup>1220</sup>

3.2.53.2.7 General Mental Elements

Finally, in addition to the specific mental elements described above (see Sections 3.2.53.4 and 3.2.53.6), practitioners will also have to satisfy the general mental elements (Article 30) that accompany the physical elements of the crime (i.e., that the perpetrator planned, prepared, initiated or executed an act of aggression; was a person in a position to effectively exercise control over or to

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<sup>1215</sup> ICC Elements of Crimes, Article 8bis, Introduction, para. 2.

<sup>1216</sup> *Non-paper by the Chairman on the Elements of Crimes, Explanatory Note*, June 2009 SWGCA Report, Annex II, Appendix II, para. 20. See also, McDougall, *Crime of Aggression under the Rome Statute*, p. 191.

<sup>1217</sup> *Nicaragua Judgment*, para. 195. See also, Eritrea-Ethiopia Claims Commission (Partial Award: *Jus Ad Bellum* – Ethiopia’s Claims 1-8, 19 December 2005) 135 ILR 497, 19 December 2005, para. 11.

<sup>1218</sup> ICC Elements of Crimes, Article 8bis, Introduction, para. 4.

<sup>1219</sup> McDougall, *Crime of Aggression under the Rome Statute*, pp. 191-192.

<sup>1220</sup> *Non-paper by the Chairman on the Elements of Crimes, Explanatory Note*, June 2009 SWGCA Report, Annex II, Appendix II, para. 25.

direct the political or military action of the State which committed the act of aggression; and the act of aggression was committed). These elements are discussed in Section 3.3.

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator planned, prepared, initiated or executed an act of aggression?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator participate in meetings in which the plans for the act of aggression were formulated?</li> <li>• Did the perpetrator plan military operations?</li> <li>• Did the perpetrator prepare the act of aggression, for example, by mobilising the armed forces?</li> <li>• Did the perpetrator implement any military or economic policy which facilitated the act of aggression? Did they acquire weapons? Did they divert State funds?</li> <li>• Did the perpetrator formally order troops to cross the border into another State, or to otherwise launch an attack?</li> <li>• Did the perpetrator execute the act of aggression?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how the perpetrator participated in high-level planning meetings in which plans for a military invasion were drawn up.</li> <li>• Video recordings taken from press conferences showing the perpetrator discussing the preparation and plan for a military invasion.</li> <li>• Official policy documents detailing plans to divert funds away from other government departments to facilitate a military invasion signed by the perpetrator.</li> <li>• An official military document containing an official order, signed by the perpetrator, for an attack to be launched against an enemy warship.</li> <li>• A receipt for weaponry used in an invasion signed by the perpetrator.</li> </ul>
<b>Does the perpetrator satisfy the 'leadership requirement'?</b>	<ul style="list-style-type: none"> <li>• Is the perpetrator a head of State?</li> <li>• If not a head of State, are they a Minister of Defence or Foreign Affairs, with the power to determine military policy?</li> <li>• Does the perpetrator occupy a military role? What rank are they? Are they able to decide military policy?</li> <li>• Does the perpetrator belong to the state which is alleged to have committed the act of aggression?</li> <li>• Could the perpetrator exercise control over or direct the political or military action of a State?</li> </ul>	<ul style="list-style-type: none"> <li>• Military documents showing that the perpetrator occupied the highest-level military office in the State, and thus possessed the authority to determine military policy.</li> <li>• Witness testimony describing the perpetrator as a government minister who played a leading role in deciding military policy.</li> <li>• Minutes of a meeting between the President and Minister of Defence finalising plans for the military operations.</li> <li>• Video footage of the perpetrator giving a formal address in which they announce the initiation of an attack against another State.</li> <li>• A photograph of the potential perpetrator around a table with the head of State and other high-level figures during a discussion on military strategy.</li> </ul>
<b>Does the evidence show that an act of aggression inconsistent with the UN Charter took place, and that the</b>	<ul style="list-style-type: none"> <li>• Did one State launch a military invasion against another State?</li> <li>• Did the armed forces of a State bombard the territory of another State?</li> <li>• Did a State initiate a blockade against the ports or coasts of another State?</li> </ul>	<ul style="list-style-type: none"> <li>• Official military documents reporting the launching of an armed attack against another State.</li> <li>• Aerial footage of troops and military vehicles moving across a State border.</li> </ul>

<p><b>perpetrator was aware of the factual circumstances?</b></p>	<ul style="list-style-type: none"> <li>• Did a State use weapons of any kind against another State?</li> <li>• Did a State maintain the presence of its troops on the territory of another State in contravention of a stationing agreement?</li> <li>• Is an internal paramilitary group carrying out attacks on one State's territory in fact acting on behalf of another State?</li> <li>• Did a State allow another State's armed forces onto its territory for the purposes of launching an attack against a third State?</li> <li>• Do the surrounding circumstances suggest that the perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the UN Charter?</li> <li>• Was the use of armed force carried out as a legitimate exercise of individual or collective self-defence?</li> <li>• Had the UN Security Council authorised the use of force?</li> </ul>	<ul style="list-style-type: none"> <li>• A photograph of a building destroyed by a missile attack on the territory of another State.</li> <li>• Forensic ballistics evidence showing that a missile fired at a military base belonged to another State.</li> <li>• Witness testimony describing an account of troops moving across the border and attacking cities in another State.</li> <li>• Open-source reports describing how naval ships belonging to another State have instigated a blockade around a port, preventing key imports.</li> <li>• Intercepted phone calls describing an attack on another States naval forces.</li> <li>• A UN General Assembly resolution condemning the use of force by a State and confirming that no lawful justification exists under the UN Charter.</li> <li>• An expert written legal opinion concluding that an attack was not carried out as a lawful exercise of self-defence.</li> </ul>
<p><b>Did the act of aggression, by its character, gravity, and scale, constitute a manifest violation of the UN Charter, and was the perpetrator aware of the factual circumstances?</b></p>	<ul style="list-style-type: none"> <li>• Under what circumstances was the use of armed force carried out?</li> <li>• How long did the act of aggression continue?</li> <li>• What level of destruction did the act of aggression cause?</li> <li>• Over what geographical area was the attack launched? For how long did the attack last?</li> <li>• Do the surrounding circumstances suggest that the perpetrator was aware of the factual circumstances that established such a manifest violation of the UN Charter?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony describing how an attack by another State's armed forces resulted in high numbers of deaths and casualties.</li> <li>• Reports by the UN that the act of aggression lasted over a month and spread across a substantial part of the State's territory.</li> <li>• Satellite imagery showing large parts of a city destroyed by shelling.</li> <li>• Video footage of a military base being struck by missiles.</li> <li>• Forensic ballistics evidence showing that multiple missiles in a range of locations all belonged to the same State.</li> </ul>

Table 61: Article 8bis Cues for Practitioners

### 3.3 DOCUMENTING THE MENTAL ELEMENTS

To hold an accused responsible for an international crime, it must be established, beyond a reasonable doubt, that they possessed the requisite mental elements (also known as *mens rea*) of the specific crime at the time of its commission. The mental elements describe the state of mind of the individual who perpetrated the acts that constitute the 'material elements' of the crime, which

include “the *conduct* described in the definition, any *consequences* that may be specified in addition to the conduct, and any *circumstances* that must exist”.<sup>1221</sup>

**Article 30 of the Rome Statute:**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - a. In relation to conduct, that person means to engage in the conduct;
  - b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

### 3.3.1 Overview of the Mental Elements under the CCU

Under the Criminal Code of Ukraine (‘CCU’), *mens rea* is referred to as ‘guilt’ and can take two forms: intent (Article 24) and recklessness (Article 25).<sup>1222</sup> However, as Ukrainian legislation does not recognise the applicability of recklessness for any international crimes,<sup>1223</sup> it will not be discussed further.

#### 3.3.1.1 The Requirement of Intent for International Crimes Under Ukrainian Law

##### 3.3.1.1.1 Intent for Genocide under Article 442

As discussed above (see Section 3.1.3.2), genocide under Article 442 requires a specific intent, namely that the genocidal acts are committed “for the purpose of the total or partial destruction of any national, ethnic, racial, or religious group”. In addition, the genocidal act (i.e., extermination, inflicting grave bodily injuries, creation of conditions of life, decrease or prevention of childbearing in the group, or forcibly transferring of children) must be committed “intentionally”. The wording does not specify the type of intent required, i.e., whether it should be direct or indirect.

##### 3.3.1.1.2 Intent for Article 438 Crimes

The commentaries to the CCU provide that the mental element required by Article 438 is *intent* in general.<sup>1224</sup> In theory, this means that the Article 438 crimes can be committed with both direct and indirect intent (see below). It is, however, difficult to see how some of the listed crimes could be

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<sup>1221</sup> O. Triffterer & K. Ambos (eds), *Rome Statute of the International Criminal Court: a Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (‘Triffterer & Ambos Commentary’), p. 1114.

<sup>1222</sup> CCU, Article 23 (“[g]uilt shall mean a mental stance of a person with regard to the performed act or omission under this Code and to the consequences thereof, as expressed in the form of intent or recklessness”).

<sup>1223</sup> This is in line with international standards as lesser forms of *mens rea*, such as recklessness (or ‘*dolus eventualis*’), were intentionally not included within the Rome Statute by the drafters. See, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Trial Judgment, 14 March 2012 (‘*Lubanga Trial Judgment*’), para. 1011; *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 360.

<sup>1224</sup> M. Khavroniuk, Commentary to Article 438 of the CCU, para. 5 in M. Melnyk, M. Khavroniuk (eds) *et al.*, *Scientific and Practical Commentary to the Criminal Code of Ukraine* (2009).

committed with indirect intent. For example, it is not possible that a person could have committed forced labour of the civilian population or pillaging of cultural property without wishing the occurrence of the injurious consequences.<sup>1225</sup> Thus, the mental element required of each Article 438 crime must be interpreted separately.

#### 3.3.1.1.3 Intent for the Crime of Aggression

Neither Article 437 of the CCU in its current form, nor Draft Bill 7290 (see below), specify the required *mens rea* element for the crime of aggression. According to the commentaries to the CCU, the crime of planning, preparing, initiating and waging an aggressive war under the current form of Article 437 of the CCU can be committed with a direct intent only.<sup>1226</sup> As Draft Bill 7290 covers essentially the same conduct, it can be presumed that it would also require direct intent.

#### 3.3.1.1.4 Intent for International Crimes Contained in Draft Bill 7290

Most of the war crimes and crimes against humanity provisions contained in Draft Bill 7290 must be committed with ‘intent’. A plain reading suggests this includes *both direct and indirect intent*. Consequently, a person acting recklessly cannot be held responsible for these crimes. However, as with Article 438, and based on a plain reading of many of the crimes contained in Draft Bill 7290, it is unlikely that those crimes could be committed with indirect intent. For example, it would be impossible for a perpetrator to take a victim hostage, or rape or torture them, without wishing the occurrence of the injurious consequences. When using an analogy to *mens rea* requirements for similar provisions of ordinary crimes,<sup>1227</sup> a direct intent is required.

In addition, one provision contained in Draft Bill 7290 – employing prohibited means of warfare (Article 438-4) – contains no indication of *mens rea*. As in similar cases of ordinary crimes, a reasonable interpretation of the rule is required. From the plain understanding of the crime’s nature, as well as relevant international criminal law standards, it appears that prohibited means of warfare cannot be employed otherwise than with a direct intent.

### **3.3.1.2 Understanding Article 24: Intent**

Article 24 provides for two categories of intent:

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<sup>1225</sup> Such understanding corresponds to the construction of elements of similar ordinary crimes. For example, ordinary crimes connected with the appropriation of property (such as theft or robbery, as well as the illegal appropriation of objects bearing cultural value) require proving direct intent: See e.g., O. Dudorov, Commentaries to Articles 185 (theft), 186 (robbery), 193 (appropriation of found property or somebody else's property that accidentally occurred to be in possession of a person) of the CCU in M. Melnyk, M. Khavroniuk (eds) *et al.*, *Scientific and Practical Commentary to the Criminal Code of Ukraine* (2009). Similarly, a military crime of pillage (i.e., whose perpetrator must be Ukrainian military or other state officials) presupposes that a direct intent must be established for proving the crime’s commission: M. Khavroniuk, Commentary to Article 432 of the CCU, para. 5 in M. Melnyk, M. Khavroniuk (eds) *et al.*, *Scientific and Practical Commentary to the Criminal Code of Ukraine* (2009).

<sup>1226</sup> M. Khavroniuk, Commentary to Article 437 of the CCU, para. 4 in M. Melnyk, M. Khavroniuk (eds) *et al.*, *Scientific and Practical Commentary to the Criminal Code of Ukraine* (2009).

<sup>1227</sup> See e.g., ordinary crimes provisions in Articles 147 (taking hostages), 127 (torture) and 152 (rape) of the CCU, all of which require direct intent. See, M. Khavroniuk, Commentary to Article 147 of the CCU, para. 4, M. Khavroniuk, Commentary to Article 127 of the CCU, para. 4, O. Dudorov, Commentary to Article 152 of the CCU, para. 5 in M. Melnyk, M. Khavroniuk (eds) *et al.*, *Scientific and Practical Commentary to the Criminal Code of Ukraine* (2009).



- **Direct intent:** “where a person was conscious of the socially injurious nature of his/her act (action or omission), anticipated its socially injurious consequences, and wished them”;<sup>1228</sup> and
- **Indirect intent:** “where a person was conscious of the socially injurious nature of his/her act (action or omission), foresaw its socially injurious consequences, and anticipated, though did not wish them”.<sup>1229</sup>

The intent of a perpetrator is determined by the interconnection of two components: (i) an intellectual element; and (ii) a volitional element.<sup>1230</sup>

- (i) The **intellectual element** refers to the perpetrator’s knowledge of the injurious nature of the act or consequence, i.e., being conscious of the socially injurious nature of the act and anticipating/ foreseeing its socially injurious consequence.<sup>1231</sup>
- (ii) The **volitional element** relates to whether the perpetrator ‘wished’ the socially injurious nature of the act and consequence, i.e., their mental and physical efforts to achieve the goal or to refrain from active action to achieve a consequence.<sup>1232</sup>

### 3.3.2 Mental Elements under Article 30 of the Rome Statute

Article 30 of the Rome Statute provides that the default mental elements (intent and knowledge) must be established in relation to each material element of the specific crime, unless otherwise specified in the Rome Statute or the Elements of Crimes.<sup>1233</sup>

What needs to be demonstrated in relation to the perpetrator’s intent and knowledge for each material element will depend upon whether they are constructed from conduct, a consequence and/or a circumstance. In other words, before using this section to assess how to collect information relevant to establishing the alleged perpetrator’s criminal mind, practitioners should return to the specific crime (as outlined in Section 3.2) to ascertain how the material elements of the crime are constructed:

- **Conduct:** a prohibited act or omission described in the definition of the crime.<sup>1234</sup> This requires intent under Article 30(2)(a) (*see* Section 3.3.2.2, below).

<sup>1228</sup> CCU, Article 24(2).

<sup>1229</sup> CCU, Article 24(3).

<sup>1230</sup> O. Dudorov, M. Khavroniuk (eds), *Criminal Law: Educational Manual* (Vaite 2014) (‘Dudorov & Khavroniuk *Educational Manual*’), pp. 187-188.

<sup>1231</sup> A. Muzyka, *Commentary to Article 24 of the CCU* (‘Muzyka Commentary to Article 24 of the CCU’), paras 1-2 in M. Melnyk, M. Khavroniuk (eds) *et al.*, *Scientific and Practical Commentary to the Criminal Code of Ukraine* (2009).

<sup>1232</sup> *See e.g.*, Resolution of the Supreme Court, Case No. 130/1007/18, 2 December 2021; Muzyka *Commentary to Article 24 of the CCU*, para. 3.

<sup>1233</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 (‘*Lubanga Decision on the Confirmation of Charges*’), para. 356 *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 (‘*Katanga & Chui Decision on the Confirmation of Charges*’), para. 532; *Bemba Decision on the Confirmation of Charges*, para. 353.

<sup>1234</sup> Triffterer & Ambos *Commentary*, p. 1114. *See e.g.*, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘*Rome Statute*’), Article 8(2)(b)(ii) (‘directing attacks against civilian objects’).

- **Consequence:** either the completed result of the crime (e.g., causing death),<sup>1235</sup> or the creation of a state of harm or risk of harm (e.g., endangerment)<sup>1236</sup> as required by a material element of the crime.<sup>1237</sup> This requires intent under Article 30(2)(b) (*see* Section 3.3.2.3).
- **Circumstance:** the factual context or situation within which the relevant crime was committed (e.g., the requisite features of the persons<sup>1238</sup> or things<sup>1239</sup> mentioned in the conduct and consequence elements).<sup>1240</sup> This requires knowledge under Article 30(3) (*see* Section 3.3.2.4).

Before describing each in more detail, the next section will outline the relationship between the mental elements under the Rome Statute and the mental elements contained in the CCU.

### 3.3.2.1 Relationship to Articles 24 and 25 of the CCU

While the mental elements under the Rome Statute appear *prima facie* different from the CCU (e.g., under the CCU, ‘knowledge’ does not stand as a separate component of *mens rea*), in substance, both standards follow a similar logic:

- The ‘intent’ requirement under Article 30 of the Rome Statute is similar to the ‘volitional element’ of guilt under the CCU, and certain elements of the ‘intellectual element’ of guilt are similar to the awareness requirement.
- The ‘knowledge’ requirement under Article 30 of the Rome Statute is similar to the ‘intellectual element’ of guilt under the CCU.

The following sections outline the Article 30 mental elements in more detail.

### 3.3.2.2 Article 30(2)(a) – Conduct: the Perpetrator Meant to Engage in the Conduct

Where the material elements of a crime amount to ‘**conduct**’, the information must establish that the perpetrator meant to engage in that conduct.<sup>1241</sup> ‘Conduct’ in this regard refers to the act or omission that the perpetrator must do (or not do) to be held responsible for the crime.<sup>1242</sup> For example:

- The war crime of attacking civilian objects requires that the perpetrator “directed an attack”.<sup>1243</sup>

<sup>1235</sup> See e.g., Rome Statute, Article 8(2)(b)(vii) (“[m]aking improper use of a flag of truce” [...] “resulting in death or serious personal injury”).

<sup>1236</sup> See e.g., Rome Statute, Article 8(2)(b)(x) (“[s]ubjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind” (...) “which cause death to or seriously endanger the health of such person or persons”).

<sup>1237</sup> Triffterer & Ambos *Commentary*, pp. 1114-1115.

<sup>1238</sup> See e.g., Rome Statute, Article 8(2)(b)(vi) (victims who are killed or wounded must be “combatants”), Article 8(2)(b)(xv) (the persons who are compelled to take part in the operations of war must be “nationals of the hostile party”).

<sup>1239</sup> See e.g., Rome Statute, Article 8(2)(b)(v) (the attacks or bombardment must be directed against “towns, villages, dwellings or buildings which are undefended and which are not military objectives”), Article 8(2)(b)(ix) (the attacks or bombardment must be directed against “buildings dedicated to religion, education, art, science [...]”).

<sup>1240</sup> Triffterer & Ambos *Commentary*, p. 1115.

<sup>1241</sup> Rome Statute, Article 30(2)(a).

<sup>1242</sup> Triffterer & Ambos *Commentary*, pp. 629, 1120-1121.

<sup>1243</sup> ICC Elements of Crimes(2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Article 8(2)(b)(ii), Element 1.

- Murder as a crime against humanity requires that the perpetrator “killed one or more persons”.<sup>1244</sup>
- The crime of aggression requires that the perpetrator “planned, prepared, initiated or executed an act of aggression”.<sup>1245</sup>

Thus, practitioners must establish whether the perpetrator intended to engage in the conduct or, in other words, whether the perpetrator’s actions were deliberate and made with awareness.<sup>1246</sup> Intent in relation to ‘conduct’ can be inferred from the factual circumstances.<sup>1247</sup> For example, intent to commit the crime against humanity of murder can be inferred from the use of a firearm against unarmed persons.<sup>1248</sup>

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator meant to engage in the conduct?</b>	<ul style="list-style-type: none"> <li>• Did the perpetrator mean to engage in the conduct?</li> <li>• Did the perpetrator engage in the prohibited conduct voluntarily/ deliberately?</li> <li>• Did the perpetrator voluntarily/ deliberately fail to act?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the perpetrator aimed the gun at a group of civilians before firing.</li> <li>• Video footage of a helicopter hovering over a building clearly marked as a hospital before dropping a bomb.</li> <li>• Knives and pliers found in a basement used for torture.</li> <li>• A video clip depicting a rebel attack on a village and the subsequent images of villagers being forced to carry heavy loads of looted goods (i.e., forced labour).</li> <li>• Newspaper reports in the aftermath of the destruction of a church showing the perpetrators posing triumphantly outside the church with weapons (i.e., destruction of certain property).</li> </ul>

Table 62: Article 30(2)(a) Cues for Practitioners

### 3.3.2.3 Article 30(2)(b) – Consequence: The Perpetrator Meant to Cause the Consequence or was Aware it would Occur in the Ordinary Course of Events

The ‘**consequence**’ of a crime refers to either a completed result, or the creation of a state of harm or risk of harm as required by a material (physical) element of the crime.<sup>1249</sup> Whilst some crimes prohibit conduct (*see above*), other crimes may instead (or additionally) prohibit a consequence, for example:

- The crime of genocide (committed by causing serious bodily or mental harm) requires that the perpetrator “caused serious bodily or mental harm to one or more persons”.<sup>1250</sup>

<sup>1244</sup> ICC Elements of Crimes, Article 7(1)(a), Element 1.

<sup>1245</sup> ICC Elements of Crimes, Article 8*bis*, Element 1.

<sup>1246</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, 7 March 2014 (‘*Katanga Trial Judgment*’), para. 1638 (*see also*, para. 774).

<sup>1247</sup> *Bemba Decision on the Confirmation of Charges*, para. 149.

<sup>1248</sup> *Bemba Decision on the Confirmation of Charges*, paras 138, 149.

<sup>1249</sup> Triffterer & Ambos *Commentary*, p. 1122, fn. 74.

<sup>1250</sup> ICC Elements of Crimes, Article 6(b), Element 1.

- The crime against humanity of murder requires that the perpetrator “killed one or more persons” (the term killed is interchangeable with the term ‘caused death’).<sup>1251</sup>
- The war crime of cruel treatment requires that the perpetrator “inflicted severe physical or mental pain or suffering upon one or more person”.<sup>1252</sup>

Where the material (physical) elements of a crime constitute a consequence, practitioners must demonstrate that the perpetrator **intended the consequence**. This means, that the perpetrator either:

- **meant to cause that consequence** (Rome Statute, Article 30(2(b)), or
- **was aware that it would occur in the ordinary course of events** (Rome Statute, Article 30(2)(b) and Article 30(3)).<sup>1253</sup>

#### 3.3.2.3.1 *Meant to Cause the Consequence*

To establish that the perpetrator meant to cause a consequence, practitioners should seek information indicating that they voluntarily acted to achieve the desired result.<sup>1254</sup> This requires the perpetrator to have acted deliberately, or failed to act, in order to cause the consequence.<sup>1255</sup> For example, the consequence of the crime of murder is the death of the victim. Accordingly, in order to establish this element in relation to the crime of murder, practitioners must demonstrate that the perpetrator acted deliberately or failed to act in order to cause the death of one or more persons.<sup>1256</sup>

#### 3.3.2.3.2 *Was Aware that the Consequence Would Occur in the Ordinary Course of Events*

In the alternative, if the information fails to establish that the perpetrator meant to cause the relevant consequence, the intent requirement can still be satisfied where the alleged perpetrator was, nonetheless, aware that the consequence would occur in the ordinary course of events.<sup>1257</sup> To meet this requirement, the information must establish the following:

- It was foreseeable that the perpetrator’s conduct would cause the consequence of the crime in the ordinary course of events, i.e., unless an unforeseen or unexpected intervention prevented its occurrence.<sup>1258</sup> Establishing ‘absolute certainty’ in relation to the foreseeability of the consequence is not required, the information need only demonstrate ‘*virtual certainty*’ that the consequence in question would occur due to the conduct (act or omission) of the perpetrator;<sup>1259</sup> and

<sup>1251</sup> ICC Elements of Crimes, Article 7(1)(a), Element 1.

<sup>1252</sup> ICC Elements of Crimes, Article 8(2)(c)(i)-3, Element 1.

<sup>1253</sup> Rome Statute, Article 30(2)(b) and (3). *See also*, Katanga Trial Judgment, para. 774.

<sup>1254</sup> Lubanga Trial Judgment, para. 1009; Lubanga Decision on the Confirmation of Charges, paras 351-352; Katanga Trial Judgment, para. 776.

<sup>1255</sup> Katanga Trial Judgment, para. 781.

<sup>1256</sup> Katanga Trial Judgment, para. 781.

<sup>1257</sup> Rome Statute, Article 30(2)(b).

<sup>1258</sup> Katanga Trial Judgment, para. 777; Bemba Decision on the Confirmation of Charges, para. 362.

<sup>1259</sup> Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (‘Ongwen Trial Judgment’), para. 2695; Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Appeal Judgment, 1 December 2014, paras 447-450; Katanga Trial Judgment, para. 776. *See also*, Bemba Decision on the Confirmation of Charges, paras 352-369.

- The perpetrator, based on their knowledge of how events ordinarily develop, was consciously aware of such virtual certainty and anticipated the occurrence of the consequence in the future.<sup>1260</sup>

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator meant to cause the consequence?</b>	<ul style="list-style-type: none"> <li>• Did the consequence(s) occur as a result of the perpetrator's actions?</li> <li>• Did the perpetrator act deliberately or fail to act in order to cause the consequence?</li> <li>• Are there any indications that the perpetrator desired to bring about or acted with the purpose of bringing about the consequence?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that the perpetrator aimed the gun at the victim's head.</li> <li>• A video of the perpetrators forcing men into a car and driving them across a border.</li> <li>• An intercepted telephone call where the commander is providing the artillery unit with the coordinates of a school.</li> <li>• Medical reports demonstrating the cause of death and the nature of injuries inflicted on the victims (beatings, gunshot wounds, etc.), indicating that the perpetrator meant to kill the victims.</li> <li>• Video footage of the perpetrator taking part in the torture of victims, demonstrating that the perpetrator meant to inflict severe physical or mental pain or suffering.</li> </ul>
<b>OR Does the evidence show that the perpetrator was aware that the consequence would occur in the ordinary course of events?</b>	<ul style="list-style-type: none"> <li>• What was the likelihood that the consequence of the crime would occur as a result of the perpetrator's conduct?</li> <li>• Was it virtually certain that the consequence would occur as a result of the perpetrator's conduct?</li> <li>• Does the evidence suggest that the alleged perpetrator must have been aware of this high likelihood?</li> <li>• Based on their knowledge at the time, can it be inferred that the perpetrator was aware that their conduct would lead to the occurrence of the prohibited consequence in the ordinary course of events?</li> </ul>	<ul style="list-style-type: none"> <li>• Witnesses testifying that the perpetrators inserted sticks into the vaginas of the victims, indicating the perpetrator was aware this would lead to death in the ordinary course of events.</li> <li>• A UN report situating the perpetrator at a place and time where children under the age of 15 years were being forcibly taken by the armed forces, indicating that the perpetrator was aware that child soldiers would be conscripted in the ordinary course of events.</li> <li>• Bodies exhumed from mass graves establishing that the victims had been subjected to torture could establish that the perpetrators must have been aware that the injuries they inflicted on the victim would cause death in the ordinary course of events.</li> <li>• A video depicting planes belonging to the armed forces under the perpetrator's command dropping bombs indiscriminately onto a village could demonstrate that the perpetrator was aware that property would be destroyed in the ordinary course of events.</li> </ul>

Table 63: Article 30(2)(b) Cues for Practitioners

<sup>1260</sup> *Lubanga Trial Judgment*, para. 1012; Triffterer & Ambos *Commentary*, pp. 1122-1123.

### 3.3.2.4 Article 30(3) – Circumstance: The Perpetrator was Aware that a Circumstance Existed

Some crimes require, as part of their material elements, that a certain circumstance exists. Where the material elements of a crime refer to a **circumstance, the information must demonstrate that the perpetrator was aware that the circumstance existed** (Rome Statute, Article 30(3)). The ‘circumstance’ refers to the factual context or situation within which the relevant crime was committed.<sup>1261</sup> For example:

- Genocide requires the victims to be “members of a national, ethnical racial or religious group”.<sup>1262</sup>
- Deportation or forcible transfer as a crime against humanity requires that the persons deported or transferred were “lawfully present in the area from which they were so deported or transferred”.<sup>1263</sup>
- The war crime of wilful killing requires the victims to have been “protected under one or more of the Geneva Conventions of 1949”.<sup>1264</sup>

To establish that the perpetrator was aware that the circumstance existed, **it must be shown that the perpetrator knew that the circumstance existed**.<sup>1265</sup> For example, as concerns the circumstance required by the war crime of conscripting child soldiers,<sup>1266</sup> the court must be satisfied that the perpetrator knew that they were under the age of 15 years.<sup>1267</sup> This can be demonstrated by, for instance, the visible presence of children under the age of fifteen years among an armed group’s soldiers or within the perpetrator’s personal guard, or by the proximity of training grounds, where young recruits were trained, to the headquarters or residence of the perpetrator.<sup>1268</sup>

Where a circumstance element involves a legal conclusion or value judgement (for example, the crime against humanity of other inhumane acts requires that the conduct “was of a character similar” to other acts listed as crimes against humanity<sup>1269</sup>), it is not required that the perpetrator completed the legal evaluation, but **simply that the accused was aware of the relevant facts that established it as such**.<sup>1270</sup>

Element	Cues for Practitioners	Examples of Evidence
<b>Does the evidence show that the perpetrator was aware that a</b>	<ul style="list-style-type: none"> <li>• What are the relevant circumstances that must exist to establish the crime in question?</li> </ul>	<ul style="list-style-type: none"> <li>• A witness testifying that they had a conversation with the perpetrator during which they referred to children who had joined the armed group because they were orphans and needed protection, indicating that the perpetrator was aware</li> </ul>

<sup>1261</sup> Triffterer & Ambos *Commentary*, pp. 631-634.

<sup>1262</sup> ICC Elements of Crimes, Article 6(a), Element 2; Article 6(b), Element 2; Article 6(c), Element 2; Article 6(d), Element 2; and Article 6(e), Element 2.

<sup>1263</sup> ICC Elements of Crimes, Article 7(1)(d), Element 2.

<sup>1264</sup> ICC Elements of Crimes, Article 8(2)(a)(i), Element 2.

<sup>1265</sup> *Lubanga Trial Judgment*, para. 1274; *Katanga Trial Judgment*, para. 778.

<sup>1266</sup> ICC Elements of Crimes, Article 8(2)(b)(xxvi).

<sup>1267</sup> *Lubanga Trial Judgment*, para. 1274.

<sup>1268</sup> *Lubanga Decision on the Confirmation of Charges*, para. 405; *Lubanga Trial Judgment*, paras 1277-1278.

<sup>1269</sup> ICC Elements of Crimes, Article 7(1)(k), Element 2.

<sup>1270</sup> ICC Elements of Crimes, General Introduction, para. 4.



<p><b>circumstance existed?</b></p>	<ul style="list-style-type: none"> <li>• What does the overall evidence show about the existence of that circumstance?</li> <li>• What information was available to the perpetrator regarding the relevant circumstances of the crime?</li> <li>• How obvious was the circumstance and what are the indications that the perpetrator was aware of the existence of such a circumstance?</li> <li>• Was the perpetrator informed about the relevant circumstance before the commission of the crime?</li> </ul>	<p>there were children within the armed group.</p> <ul style="list-style-type: none"> <li>• Video evidence depicting the perpetrator participating in the removal of civilians (wearing civilian clothes) from their homes and loading them onto busses, indicating the perpetrator was aware of their civilian status.</li> <li>• A UN report that situating the perpetrator at a place and time where children clearly under the age of 15 years were being forcibly enrolled into the armed group.</li> <li>• An NGO report describing a situation where an armed group, led by the perpetrator, entered a hospital and removed the medical staff within to take them hostage, indicating that the perpetrator was aware they were protected persons.</li> </ul>
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Table 64: Article 30(3) Cues for Practitioners

## 3.4 DOCUMENTING MODES OF LIABILITY

### 3.4.1 Relevance of International Law Principles to Investigating and Prosecuting Modes of Liability Under the Criminal Code of Ukraine

This section describes the ways in which perpetrators can be held responsible for their participation in international crimes through the modes of liability recognised under the Ukrainian Criminal Code ('CCU'). To hold an individual responsible for an international crime, practitioners must demonstrate that the alleged perpetrator acted in a specific way, and that those actions contributed to the crimes in a specific way.

International crimes are committed against a backdrop of widespread, organised criminality that is often characterised by numerous overlapping types/levels of criminal responsibility. Whereas domestic criminal law typically focuses on principal perpetrators – i.e., those who pulled the trigger – responsibility for international crimes often lies with mid- and high-level perpetrators who contribute to the crime through multiple layers of decision-making. Given their role in causing or controlling events, these perpetrators (e.g., senior politicians, high-ranking military or security personnel, etc.) are often considered to be the “most” responsible for the commission of atrocity crimes, notwithstanding the fact that they did not physically commit those crimes themselves.<sup>1271</sup>

To capture the responsibility of perpetrators of the mass, organised criminality which occurs in conflict situations, different international courts and tribunals have developed and incorporated

<sup>1271</sup> M. Osiel, *Making Sense of Mass Atrocity* (CUP 2009), p. 247; J.G. Stewart, ‘The End of Modes of Liability for International Crimes’ (2012) 25 *Leiden Journal of International Law* 165, pp. 165-167.

different variations of modes of liability. Generally, as discussed below, these modes of liability fall under one of the following categories: principal liability (including modes of liability developed to reflect the commission of crimes by a co-perpetrator or groups); accomplice liability; command/superior responsibility; and incitement to genocide.

The modes of liability relevant to international crimes (*see* Section 3.2) – including under Articles 437 (waging an aggressive war), 438 (war crimes) and 442 (genocide) of the CCU – are set out in Articles 18 and 26 to 31 of the CCU. In addition, some forms of commission under Articles 426, 438 and 442 are *de facto* analogous or comparable to certain well-established modes of liability under international criminal law (‘ICL’) (i.e., ordering the commission of war crimes, command responsibility for the commission of war crimes and incitement to genocide).

While these modes of liability largely do not differ from the modes of liability applicable when ordinary crimes are committed, an examination of the modes of liability which have been developed in ICL can shed light on how the modes under the CCU may operate in the context of international crimes. Accordingly, this section seeks to analyse how the modes of liability under the CCU can be interpreted in line with international law to illustrate how they can effectively capture the conduct of perpetrators (including higher level and remote perpetrators) of international crimes.

Accordingly, this section: (i) sets out some general considerations related to modes of liability when investigating and prosecuting conduct amounting to international crimes; (ii) outlines the modes of liability under Ukrainian criminal law; (iii) outlines the modes of liability under ICL and discusses the applicability of these modes to the investigation and prosecution of international crimes under Ukrainian law; and (iv) outlines the definition of these modes and draws comparisons between the modes provided for under the CCU and those set out under ICL. As such, the final sub-section has been divided into a discussion of principal liability; liability for groups, organised groups and criminal organisations; accessory liability; ordering the commission of war crimes; command responsibility; and incitement to genocide.

### **3.4.2 Modes of Liability: General Considerations**

Given the complexity of international crimes, the appropriate mode of liability needed to establish an accused’s criminal responsibility will be highly contingent upon the facts of a particular case. That said, given their importance, practitioners should keep in mind the following general considerations when seeking to establish modes of liability in relation to an accused.

#### **3.4.2.1 Have Practitioners Considered that Multiple Levels of Perpetration may Arise in Relation to a Particular Crime?**

International crimes are committed against a backdrop of widespread, organised criminality that is often characterised by numerous different and overlapping types/levels of criminal responsibility. Whilst the liability of those that physically commit crimes will often be readily apparent, within organised criminal collectives there will be a range of other mid- and high-level perpetrators who contributed to the crime through multiple layers of decision-making. Given their role in causing or controlling events, these perpetrators (e.g., senior politicians or high ranking military or security personnel) are often considered to be the ‘most’ responsible for the commission of atrocity crimes,

notwithstanding the fact that they did not physically commit those crimes themselves.<sup>1272</sup> As far as possible, when considering evidence relating to international crimes, practitioners should therefore remain aware of the need to identify any information that will allow them to discover the contribution of those who were more remote from the actual physical perpetration, but were nonetheless instrumental or influential in the commission of those crimes.

#### **3.4.2.2 *Where there are Numerous Potentially Applicable Modes of Liability, Have Practitioners Identified Those Best Supported by the Available Evidence?***

Practitioners should pursue the mode(s) of liability that are best supported on the available evidence in order to increase the strength of their own case and avoid the risk of overloading or confusing the indictment with unsupported or frivolous claims.<sup>1273</sup> Naturally, this will depend upon the evidence that practitioners possess in relation to a set of alleged facts, and on the rules regarding what evidence might be admissible in court. This includes, for example, evidence and information related to the defendant's personality (i.e., their criminal record, nature or certain features of their character), which is generally inadmissible under Article 88 of the Ukrainian Criminal Procedure Code ('CPC').

#### **3.4.3 Modes of Liability under Ukrainian Criminal Law**

The CCU provides for a variety of modes of liability which are applicable generally (i.e., to all crimes listed in the Code including ordinary crimes and international crimes) under Articles 18, 27 and 28.

The 'criminal offender' (or perpetrator) is defined in Article 18 of the CCU as "a sane person who has committed a criminal offense at the age when criminal liability may arise under this Code". Each crime listed in the CCU defines the acts or omissions that the perpetrators must commit to be held liable as the principal (or co-principal).<sup>1274</sup>

Chapter VI of the CCU sets out the provisions relating to complicity. Under Article 26 of the CCU, "[c]riminal complicity shall mean the wilful co-participation of several criminal offenders in an intended criminal offence." Article 27 further defines the modes of liability relating to accomplices and Article 28 sets out the liability for criminal offences "committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation".

Mode of Liability	Definition
<b>Article 27.</b> Types of accomplices	<ol style="list-style-type: none"> <li>1. Organiser, abettor and accessory, together with the principal offender, are deemed to be accomplices in a criminal offense.</li> <li>2. The principal (or co-principal) is the person who, in association with other criminal offenders, has committed a criminal offense under this Code, directly or through other</li> </ol>

<sup>1272</sup> M. Osiel, *Making Sense of Mass Atrocity* (CUP 2009), p. 247; J. Stewart 'The End of Modes of Liability for International Crimes' (2012) 25 *Leiden Journal of International Law* 165, pp. 165-167.

<sup>1273</sup> W. Jordash & J. Coughlan, 'The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy' in S. Darcy & J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010), p. 309 (Jordash & Coughlan (2010)).

<sup>1274</sup> See, Criminal Code of Ukraine of 5 April 2001 No. 2341-III ('CCU'), Article 29.

	<p>persons, who cannot be criminally liable, in accordance with the law, for what they have committed.</p> <p>3. The organiser is a person who has organised a criminal offense (or criminal offenses) or supervised its (their) preparation or commission. The organiser is also a person who has created an organised group or criminal organisation, or supervised it, or financed it, or organised the covering up of the criminal activity of an organised group or criminal organisation.</p> <p>4. The abettor is a person who has induced any other accomplice to a criminal offense, by way of persuasion, subornation, threat, coercion or otherwise.</p> <p>5. The accessory is a person who has facilitated the commission of a criminal offense by other accomplices, by way of advice, or instructions, or by supplying the means or tools, or removing obstacles, and also a person who promised in advance to conceal a criminal offender, tools or means, traces of crime or criminally obtained things, to buy or sell such things, or otherwise facilitate the covering up of a criminal offense.</p> <p>[...]</p>
<p><b>Article 28.</b> Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation</p>	<p>1. A criminal offense shall be held to have been committed by a group of persons where several (two or more) principal offenders participated in that criminal offense, acting without prior conspiracy.</p> <p>2. A criminal offense shall be held to have been committed by a group of persons upon prior conspiracy where it was jointly committed by several (two or more) persons who have conspired in advance, that is prior to the commencement of the offense, to commit it together.</p> <p>3. A criminal offense shall be held to have been committed by an organised group where several persons (three or more) participated in its preparation or commission, who have previously established a stable association for the purpose of committing of this and other offense (or offenses), and have been consolidated by a common plan with assigned roles designed to achieve this plan known to all members of the group.</p> <p>4. A criminal offense shall be held to have been committed by a criminal organisation where it was committed by a stable hierarchical association of several persons (five and more), members or structural units of which have organised themselves, upon prior conspiracy, to jointly act for the purpose of directly committing of grave or special grave criminal offenses by the members of this organisation, or supervising or coordinating criminal activity of other persons, or supporting the activity of this criminal organisation and other criminal groups.</p>

*Table 65: Modes of Liability under the CCU*

Articles 29 to 31 expand upon the criminal liability of principals and accomplices to the commission of crimes. These provisions will be examined further in Sections 3.4.5.1 to 3.4.5.3.

In addition, the CCU contains certain forms of commission under Articles 426, 438 and 442 which are comparable to well-established modes of liability under ICL. In sum, these include:

1. “[G]iving an order to commit any such action” which falls under Article 438, namely a violation of the rules of warfare (i.e., war crimes) (*see* Section 3.4.5.4);

2. “[O]mission of military authorities” under Article 426, which is a criminal offence when perpetrated by Ukrainian military or other military-related government officials.<sup>1275</sup> As discussed in Section 3.4.5.5, while there is no explicit equivalent in the CCU for similar responsibility of the adversary’s superior or military commanders ‘failure to act’, such conduct can fall under Article 438 since such conduct is codified in Additional Protocol I,<sup>1276</sup> i.e., a “violation of the rules of warfare recognised by international instruments consented to as binding by the Verkhovna Rada”.
3. “[P]ublic calls to genocide, and also making any materials with calls to genocide for the purpose of distributions, or distribution of such materials” under Article 442(2) (*see* Section 3.4.5.6).

### 3.4.4 Modes of Liability Under International Criminal Law

The statutes and jurisprudence of the international courts and tribunals, including the ICTY, the ICTR and the ICC, have played an instrumental role in defining the various modes of liability applicable to international crimes. The modes of liability recognised under ICL are:

- Principal liability through direct perpetration;<sup>1277</sup>
- Principal liability for higher-level perpetrators (including through joint criminal enterprise before the *ad hoc* tribunals, and indirect perpetration, co-perpetration and indirect co-perpetration before the ICC);<sup>1278</sup>
- Accessory liability (including through planning; instigating, soliciting or inducing; aiding and abetting; ordering; and other contributions to crimes);<sup>1279</sup>
- Command responsibility;<sup>1280</sup> and
- Incitement to genocide.<sup>1281</sup>

While the CCU’s provisions setting out the modes of liability encompass much of the conduct incorporated into the modes of liability set out in international instruments and practice, the plain wording of the CCU is not fully reflective of the broad range of roles performed by those who contribute to international crimes, which – if interpreted narrowly – can significantly limit accountability for international crimes. Therefore, seeking guidance from the modes of liability

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<sup>1275</sup> CCU, Article 401(2).

<sup>1276</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) (‘Additional Protocol I’), Articles 86 and 87.

<sup>1277</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Article 25(3)(a); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘ICTY Statute’), Article 7(1); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘ICTR Statute’), Article 6(1).

<sup>1278</sup> Rome Statute, Article 25(3)(a); ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).

<sup>1279</sup> Rome Statute, Articles 25(3)(b)-(d); ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).

<sup>1280</sup> Rome Statute, Article 28; ICTY Statute, Article 7(3); ICTR Statute, Article 6(3).

<sup>1281</sup> Rome Statute, Article 25(3)(e); ICTY Statute, Article 4(3)(c); ICTR Statute, Article 2(3)(c).

under ICL, and relying on thoroughly developed and well-tested interpretations of those principles, can assist practitioners in appropriately allocating responsibility for such crimes beyond principal perpetrators to fully grasp the realities of armed conflict and mass atrocities.

This approach is compliant with Ukrainian law for the following reasons:

1. Many of the modes of liability developed by international law (including those recognised by the ICTY)<sup>1282</sup> are reflective of customary international law, which is binding on all States, including Ukraine.<sup>1283</sup>
2. The European Court of Human Rights ('ECtHR') has held that it does not violate the principle of legality to convict perpetrators for war crimes using modes of liability enshrined in customary international law.<sup>1284</sup>
3. The Constitutional Court of Ukraine has adopted the principle of taking a 'friendly attitude' to international law according to which "the Constitutional Court of Ukraine takes into account the provisions of existing international treaties approved by the Verkhovna Rada of Ukraine and the practice of interpretation and application of these agreements by international bodies whose jurisdiction is recognised by Ukraine".<sup>1285</sup> In addition, Ukrainian Courts have established a practice of relying upon international instruments and practice when interpreting international law principles in their jurisprudence.<sup>1286</sup>

### **3.4.5 Definition of the Modes of Liability under the CCU and ICL**

Each of the modes of liability outlined in the CCU will be discussed, in turn, below.

#### **3.4.5.1 Principal and Co-Principal Liability**

Principal liability under the CCU covers the persons who directly committed the crime. Each crime listed in the CCU defines the acts or omissions that the perpetrator(s) must commit to be held liable as the principal (or co-principal).<sup>1287</sup> The subjective elements that the principal offender must satisfy

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<sup>1282</sup> See e.g., *Prosecutor v. Milutinović*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003 ('*Milutinović* Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise'), para. 21.

<sup>1283</sup> See e.g., Dr J. Kellenberger, President of the International Committee of the Red Cross, 'Foreword' in J.M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (CUP 2009) ('*Customary IHL, Vol. I: Rules*'), xv-xvii. Modes established under customary international law may be applied to perpetrators in the context of the Ukrainian conflict as long as the principle of legality is upheld, namely that the liability stems from a principle of law to which they were subject at the time, and it was reasonably foreseeable that they would be criminally liable. See, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Vol 1, p. 219; *Kononov v. Latvia*, Application No. 36376/04, Judgment of 17 May 2010 ('*Kononov v. Latvia* Judgment'), para. 235; *Milanković v. Croatia*, Application No. 33351/20, Judgment of 20 January 2022 ('*Milanković v. Croatia* Judgment'), paras 62-66.

<sup>1284</sup> *Milanković v. Croatia* Judgment, paras 52-66: The lack of explicit codification is no bar to holding perpetrators accountable and judicial mechanisms may have recourse to customary law in interpreting and applying domestic provisions based on the general acceptance of the "gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence [under domestic law] and could reasonably be foreseen". See also, *Kononov v. Latvia* Judgment, paras 211-213.

<sup>1285</sup> Constitutional Court of Ukraine, Decision of 1 June 2016 No. 2-пп/2016, para. 2.3.

<sup>1286</sup> See e.g., Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022 where the Court relied on Article 8bis of the Rome Statute and other international instruments to interpret Article 437 of the CCU in line with the international crime of aggression. For more information, see Section 3.2.53.

<sup>1287</sup> CCU, Article 29.



are contained in Articles 24 and 25, generally, or specified in the provision setting out the specific offence.

In addition, Article 27(2) covers co-principals who commit crimes “in association with other criminal offenders” either “directly or through others”. According to Article 26 “criminal complicity is the wilful co-participation of several criminal offenders in an *intended* criminal offence”. Article 29(1) provides that the “principal (or co-principals) shall be criminally liable under that article of the Special Part of this Code which creates the offence he has committed”.

Accordingly, principal liability extends to:

1. The **direct perpetrator** (i.e., principal) who has committed the objective and subjective elements of the offence;<sup>1288</sup>
2. **Co-principals** who, in “association with other criminal offenders” have directly committed the offence, i.e., they have jointly committed the objective elements of the offence, and shared the subjective elements;<sup>1289</sup>
3. Perpetrators or co-perpetrators who have committed the criminal offence “**through other persons**, who cannot be criminally liable, in accordance with the law, for what they have committed”.<sup>1290</sup>

Neither the CCU nor Ukrainian practice draw any substantial difference between principals and co-principals.<sup>1291</sup> In order to be recognised as a co-principal, it is sufficient for a person to at least partially fulfil the *actus reus* of the crime together with (an)other person(s),<sup>1292</sup> with the necessary intent.<sup>1293</sup> The possible distribution of roles between co-perpetrators does not affect the legal qualification of the conduct. Further, even if they differ, the actions of co-perpetrators are considered legally identical.<sup>1294</sup>

#### 3.4.5.1.1 *Principal Liability under ICL*

Principal liability under ICL encompasses similar conduct to that recognised under the CCU. Accordingly, this section will consider the interpretation of direct perpetrators and perpetrators who have committed an offence through others who are not criminally responsible. As discussed below (*see* Section 3.4.5.2), however, ICL has also developed various principles which further distinguish

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<sup>1288</sup> CCU, Article 18 and the relevant offence under the CCU which sets out the acts or omissions which must be fulfilled.

<sup>1289</sup> CCU, Article 26: “Criminal complicity is the wilful co-participation of several criminal offenders in an intended criminal offence”, and Article 27(2): “The principal (or co-principal) is the person who, in association with other criminal offenders, has committed a criminal offence under this Code, directly [...]”.

<sup>1290</sup> CCU, Article 27(2): “The principal (or co-principal) is the person who, in association with other criminal offenders, has committed a criminal offence under this Code, [...] through other persons, who cannot be criminally liable, in accordance with the law, for what they have committed”.

<sup>1291</sup> O. Dudorov, M. Khavroniuk (eds), *Criminal Law: Educational Manual* (Vaite 2014) (“Dudorov & Khavroniuk *Educational Manual*”), p. 232.

<sup>1292</sup> Dudorov & Khavroniuk *Educational Manual*, p. 232.

<sup>1293</sup> CCU, Article 29(1).

<sup>1294</sup> Dudorov & Khavroniuk *Educational Manual*, p. 232.

between principals and accomplices in order to assign responsibility to more remote perpetrators who act according to common plans or who control the commission of the crimes.

3.4.5.1.1.1 *Direct Perpetration (Alone or Jointly with Others) (Article 25(3)(a), Rome Statute; Article 7(1), ICTY Statute; Article 6(1), ICTR Statute)*

Those who are considered direct perpetrators under ICL do not substantially differ from those who are considered (co-)principals under the CCU. In particular, direct perpetration requires that the accused physically committed the crime and satisfied the mental element required by the crime in question.<sup>1295</sup> The ICTY has recognised that the physical elements of this mode of liability are fulfilled when the “accused participated, physically or otherwise directly, alone or jointly with others, in the material elements of a crime provided for in the Statute”.<sup>1296</sup> Thus there can be “several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence”.<sup>1297</sup> A person may be jointly liable as the principal perpetrator where, for example, the accused participated physically in the material elements of the crime of murder, without the need to show whose bullets killed each victim.<sup>1298</sup>

Such conduct would be covered under Articles 18 or 27(2) of the CCU in relation to a co-principal who “in association with other criminal offenders, has committed a criminal offence under this Code, directly [...]”.

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• By what means did the accused commit the crime?</li> <li>• Did the accused cause the crime by their actions (e.g., pulling the trigger)?</li> <li>• Did the accused cause the crime by their omissions?</li> <li>• Is there evidence establishing causation between the crime and the accused’s conduct?</li> <li>• At what time and location did the events take place?</li> </ul>	<ul style="list-style-type: none"> <li>• An eyewitness describing having seen the perpetrator shoot and kill a civilian.</li> <li>• Official military documents recording that the accused launched the missile that targeted civilian objects.</li> <li>• Video footage of the accused shooting at civilians.</li> <li>• Forensic evidence showing the presence of the accused’s DNA at a detention facility where detainees were tortured.</li> </ul>

<sup>1295</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 (*‘Lubanga Decision on the Confirmation of Charges’*), para. 332(i); *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 14 October 2008 (*‘Katanga & Chui Decision on the Confirmation of Charges’*), para. 488; *Prosecutor v. Lukić & Lukić* IT-98-32/1-T, Judgment, 20 July 2009 (*‘Lukić & Lukić Trial Judgment’*), para. 897; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgment, 30 November 2005 (*‘Limaj et al. Trial Judgment’*), para. 509; *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, Trial Judgment (*‘Kunarac et al. Trial Judgment’*) para. 390; *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Trial Judgment, 31 March 2003 (*‘Naletilić & Martinović Trial Judgment’*), para. 62; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001 (*‘Krstić Trial Judgment’*), para. 601; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, 5 December 2003 (*‘Galić Trial Judgment’*), para. 168; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Judgment, 6 December 1999 (*‘Rutaganda Trial Judgment’*), para. 43.

<sup>1296</sup> *Lukić & Lukić Trial Judgment*, para. 897; *Limaj et al. Trial Judgment*, para. 509; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgment, 3 April 2008, para. 615.

<sup>1297</sup> *Kunarac et al. Trial Judgment*, para. 390.

<sup>1298</sup> *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Appeal Judgment, 4 December 2012, para. 162; *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeal Judgment, 27 November 2007, paras 47-50.

<ul style="list-style-type: none"> <li>• Can the identities of the victims be identified?</li> </ul>	
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Table 66: Direct Perpetration Cues and Examples of Evidence

### 3.4.5.1.1.2 Perpetration Through Others Not Criminally Liable (Article 25(3)(a), Rome Statute)

Principal liability of persons who commit crimes through other persons who cannot be held criminally responsible for the commission of those crimes is also recognised under ICL. In particular, the Rome Statute provides for the mode of liability of “commission through another” (i.e., indirect perpetration under Article 25(3)(a)). This includes situations where the perpetrator exercises control over the will of someone who bears no criminal culpability for their actions.<sup>1299</sup> This mode of liability requires that the accused: (i) exerted control over the crime whose material elements were brought about by one or more persons; (ii) met the mental elements for the crime committed; and (iii) was aware of the factual circumstances allowing them to exert control over the crime through others.<sup>1300</sup> Accordingly, given the control exerted by the indirect perpetrator, this mode of liability applies to situations where the direct perpetrator does not incur criminal responsibility (i.e., they lack the requisite *mens rea* to be found liable), despite the fact that they physically committed the crime.<sup>1301</sup>

Such conduct would be covered under Article 27(2) of the CCU, which provides for liability of principals (or co-principals) who committed the crime through other persons who are not criminally liable. Such individuals can be, for example, persons: under the age of criminal responsibility; acting under irresistible coercion and extreme necessity; insane; or “innocent agents” (i.e., persons who, being misled about the true nature of the act, performed the *actus reus* of the crime lacking the requisite *mens rea*).<sup>1302</sup>

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• Did the accused exert control over another person who committed a crime?</li> <li>• Was the direct perpetrator a minor below the age of criminal responsibility?</li> <li>• Did the direct perpetrator suffer from mental deficiency or impairment?</li> <li>• Was the direct perpetrator involuntarily intoxicated?</li> <li>• Did the direct perpetrator commit the crime as an inadvertent</li> </ul>	<ul style="list-style-type: none"> <li>• The testimony of an operator of a GRAD MLS that the accused (the commander of an artillery unit) provided the operator with subordinates for an attack, which they believed were for military objectives, but later found out that the accused knew the coordinates were for a residential area where no military objective was present.</li> <li>• Medical reports showing that the direct perpetrator suffered from a mental disorder which rendered them unable to understand the crime that the accused asked them to commit.</li> <li>• Intercepted communications suggesting that the direct perpetrators were threatened with death by the accused if they did not commit the crime.</li> </ul>

<sup>1299</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15 A, Appeal Judgment, 15 December 2022 (*Ongwen Appeal Judgment*), para. 628; *Lubanga Decision on the Confirmation of Charges*, para. 332; *Katanga & Chui Decision on the Confirmation of Charges*, para. 488. It should be noted that this mode of liability also covers situations where the accused exercised control over an organised hierarchical organisation (see Section 3.4.5.2.1.2).

<sup>1300</sup> *Katanga Trial Judgment*, para. 1414.

<sup>1301</sup> *Ongwen Appeal Judgment*, paras 627-628.

<sup>1302</sup> Dudorov & Khavroniuk *Educational Manual*, pp. 144-145. See also, *Ongwen Appeal Judgment*, para 628, R. Cryer et al. (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn, CUP 2015) (*Cryer et al. (2015)*), p. 367.

participant acting under duress or mistake? • Was the accused aware of the circumstances fundamental to their exertion of control over the crime?	
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Table 67: Perpetration Through Others Not Criminally Liable Cues and Examples of Evidence

### 3.4.5.2 Liability for Groups of Persons, Organised Groups and Criminal Organisations

The CCU contains various provisions which expand upon how crimes can be committed by groups of persons, organised groups and criminal organisations, namely Articles 27(3), 28 and 30.

According to Article 28 of the CCU:

1. A criminal offence can be *committed* by a group of persons where at least two principal offenders participated in the criminal offence, without prior conspiracy.<sup>1303</sup>
2. A criminal offence can be committed by a group of persons *upon prior conspiracy* where it was jointly committed by at least two persons who have conspired in advance to commit it together.<sup>1304</sup>
3. A criminal offence can be committed by an organised group where at least three people participated in its perpetration or commission, who have previously established a stable association for the purpose of committing this and other offence(s) and have been consolidated by a *common plan* with assigned roles designed to achieve this plan which is *known* to all members of the group.<sup>1305</sup>
4. A criminal offence can be committed by a criminal organisation where it was committed by a *stable hierarchical association of at least five or more members or structural units which have organised themselves, upon prior conspiracy*, to jointly act for the *purpose* of directly committing grave or special grave criminal offences by members of this organisation, or supervising or coordinating criminal activity of other persons, or supporting the activity of this criminal organisation and other criminal groups.<sup>1306</sup>

This provision does not establish a separate mode of liability. Rather, the conduct of a person committing a crime with a group of persons, an organised group or a criminal organisation must fall under one of the modes listed under Article 27 (e.g., (co-)principal, organiser, abettor or accessory) in order to incur individual criminal responsibility.<sup>1307</sup>

As with other forms of complicity under the CCU, to be held responsible under Article 28 (in connection with another relevant mode under Article 27) the accused must have committed the criminal offence intentionally.<sup>1308</sup>

<sup>1303</sup> CCU, Article 28(1) (emphasis added).

<sup>1304</sup> CCU, Article 28(2) (emphasis added).

<sup>1305</sup> CCU, Article 28(3) (emphasis added).

<sup>1306</sup> CCU, Article 28(4) (emphasis added).

<sup>1307</sup> M. Melnyk, *Scientific and Practical Commentary on Article 28 of the Criminal Code of Ukraine* (1 January 2009).

<sup>1308</sup> CCU, Article 26.

In addition, as discussed in more detail below (*see* Section 3.4.5.3.1.1), under Article 27(3), an accused may be held responsible for organising a crime where they have “created an organised group or criminal organisation, or supervised it, or financed it, or organised the covering up of the criminal activity of an organised group or criminal organisation”. Article 30(1) further provides that the organiser will be criminally liable for the crimes committed by the organised group or criminal organisation if those crimes formed part of their intent.

While these provisions are not directly comparable to any mode of liability under ICL, they do hold similarities with various principles which have been developed to assign responsibility to individuals who are responsible for the commission of international crimes as part of a group of persons or through organisations.

#### 3.4.5.2.1 Liability for Persons Acting in Groups or Through Organisations under ICL

ICL has developed different theories to recognise the responsibility of a “broad range of individuals who work together to bring to fruition massive and logistically complex crimes”.<sup>1309</sup> In such cases, the case-law of the ICC and other international courts and tribunals supports taking a broad approach to the concept of ‘commission’ to encompass leaders and organisers who do not physically perpetrate the criminal acts in question.<sup>1310</sup> Only holding responsible the perpetrators who directly carried out the material elements of the crimes would disregard the role of higher level perpetrators who made the commission of the crime possible, and to hold such perpetrators responsible only as accessories may not capture the degree of their culpability.<sup>1311</sup> Accordingly, the international courts and tribunals have held that it is not necessary for such persons to carry out the crime personally and directly.<sup>1312</sup>

The *ad hoc* tribunals and the ICC have developed different theories relating to the joint commission of crimes. While these theories are not directly applicable to the CCU, and do not provide direct comparisons to Article 28, they can provide practitioners with useful guidance on how international trials have approached the responsibility of individuals who commit crimes in groups of co-perpetrators or through organisations. In particular, these modes of liability may offer guidance to assess the scope of Article 28 – in particular in relation to the concepts of ‘conspiracy’, ‘common plan’, ‘organised group’ or ‘stable hierarchical organisation’ – and where Article 28 can appropriately be applied in connection to principal liability under the CCU (*see* Section 3.4.5.1) rather than accessory liability (*see* Section 3.4.5.3).

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<sup>1309</sup> S. Brammertz and M. Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP 2016) (‘Brammertz & Jarvis, *Prosecuting CRSV*’), p. 221, citing *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999 (‘*Tadić Appeal Judgment*’), para. 192.

<sup>1310</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2<sup>nd</sup> edn, OUP 2016) (‘Schabas, *ICC: Commentary*’), p. 570. *See also*, *Tadić Appeal Judgment*, para. 192; *Lubanga Decision on the Confirmation of Charges*, para. 330; *Ongwen Appeal Judgment*, para. 627; *Brima Appeal Judgment*, paras 72-80; *Karemera et al. Appeal Judgment*, para. 145.

<sup>1311</sup> *Tadić Appeal Judgment*, para. 192.

<sup>1312</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Appeal Judgment, 1 December 2014 (‘*Lubanga Appeal Judgment*’), para. 458; *Ongwen Appeal Judgment*, para. 627; *Tadić Appeal Judgment*, para. 192; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgment, 28 February 2005 (‘*Kvočka et al. Appeal Judgment*’), para. 112; *Prosecutor v. Krnojelac* IT-97-25-A, Appeal Judgment, 17 September 2003 (‘*Krnojelac Appeal Judgment*’), para. 116; *Ntakirutimana et al. Appeal Judgment*, para. 466.



#### 3.4.5.2.1.1 ICTY/ICTR: Joint Criminal Enterprise (Article 7(1), ICTY Statute; Article 6(1), ICTR Statute)

The ICTY developed the mode of liability of ‘joint criminal enterprise’ (‘JCE’),<sup>1313</sup> which was subsequently relied upon by other *ad hoc* tribunals.<sup>1314</sup> This form of liability is established in customary international law,<sup>1315</sup> and is viewed as a form of “commission”, which consequently results in principal liability.<sup>1316</sup> JCE has also been utilised by other domestic courts adjudicating on international crimes.<sup>1317</sup>

The ICTY developed three distinct categories of JCE liability. Each category has the same objective elements, namely: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime; and (iii) the participation of the accused in the common purpose by making a significant contribution to the commission of the crimes encompassed by the common purpose.<sup>1318</sup> A common criminal purpose need not have been previously arranged or formulated, but may materialise extemporaneously.<sup>1319</sup> The common purpose can be inferred from the fact that a plurality of persons acts in unison to put into effect a JCE.<sup>1320</sup> The direct perpetrator need not be a member of the JCE if it is shown that the crime can be imputed to another member of the JCE, and that this member – when using the direct perpetrator – acted in accordance with the common plan.<sup>1321</sup> The accused’s participation need not involve the commission

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<sup>1313</sup> See for the development of the mode: *Tadić* Appeal Judgment, para. 192-226.

<sup>1314</sup> See e.g., *Prosecutor v. Kondewa*, SCSL-2003-12-PT, Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003, para. 9; *Prosecutor v. Brima et al.*, SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 1 April 2004, para. 49; *Ntakirutimana et al.* Appeal Judgment, para. 463; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5 and ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, paras 13-16; *Prosecutor v. Karemera et al.*, ICTR-98-44-A, Appeal Judgment, 29 September 2014, para. 145, 623; *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Appeal Judgment, 22 February 2008, paras 72-80; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Appeal Judgment, 26 October 2019, paras 394, 400.

<sup>1315</sup> See e.g., *Tadić* Appeal Judgment, para. 220; *Prlić et al.* Trial Judgment: Volume II, paras 587, 591; *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeal Judgment, 8 April 2015, para. 281; *Popović et al.* Appeal Judgment, para. 1672; *Brdanin* Appeal Judgment, para. 363, 405.

<sup>1316</sup> See e.g., *Kvočka et al.* Appeal Judgment, paras 79-80; *Prosecutor v. Seromba*, ICTR-2001-66-A, Appeal Judgment, 12 March 2008, para. 182; *Milutinović* Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, paras 20, 31. See also, Brammertz & Jarvis, *Prosecuting CRSV*, p. 222.

<sup>1317</sup> See e.g., Court of BiH, *Mejakić et al.*, Case No. X-KRŽ-06/200, Second Instance Verdict, 16 February 2009; Court of BiH, *Rašević et al.*, Case No. X-KRŽ-06/275, 1st Instance Verdict, 28 February 2008, pp. 103-108 (English)/pp. 113-120 (Bosnian/Serbian/Croatian). The first instance reasoning was upheld on appeal, as noted by the ICTY Prosecutor: *Rašević et al.* Prosecutor’s Final Progress Report, para. 6j. See also, UN Interregional Crime and Justice Research Institute, ‘Modes of Liability: Commission & Participation’ (2018), pp. 45-59; Bangladesh: International Crimes Tribunal-1, *Chief Prosecutor vs. Md. Abdul Aziz alias Habul & 2 Ors.* Judgment, para 365, 424.

<sup>1318</sup> *Tadić* Appeal Judgment, para. 227; *Prosecutor v. Stanišić & Simatović*, IT-03-69-A, Appeal Judgment, 9 December 2015 (‘*Stanišić & Simatović* Appeal Judgment’), para. 77; *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgment, 22 March 2006 (‘*Stakić* Appeal Judgment’), para. 64; *Prosecutor v. Stanišić & Župljanin*, IT-08-91-A, Appeal Judgment, 30 June 2016, paras 110, 136; *Popović et al.* Appeal Judgment, para. 1378; *Prosecutor v. Šainović et al.*, IT-05-87-A, Appeal Judgment, 23 January 2014 (‘*Šainović et al.* Appeal Judgment’), para. 987; *Brdanin* Appeal Judgment, para. 430.

<sup>1319</sup> *Stakić* Appeal Judgment, para. 64; *Tadić* Appeal Judgment, para. 227.

<sup>1320</sup> *Prosecutor v. Dordević*, IT-05-87/1-A, Appeal Judgment, 27 January 2014, para. 141, citing *Prosecutor v. Krajišnik*, IT-00-39-A, Appeal Judgment, 17 March 2009 (‘*Krajišnik* Appeal Judgment’), fn. 418; *Brdanin* Appeal Judgment, para. 430. It is, therefore, not required, as a matter of law, that a trial chamber make a separate finding on the individual actions and the intent of each member of a joint criminal enterprise to establish that a plurality of persons acted together in implementing the common criminal purpose.

<sup>1321</sup> *Prosecutor v. Martić*, IT-95-11-A, Appeal Judgment, 8 October 2008, para. 168; *Brdanin* Appeal Judgment, paras 413, 430.



of a specific crime (for example, murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.<sup>1322</sup>

The mental elements for each of the three JCE categories varies:

- JCE I liability requires that the accused intended to perpetrate the crimes (this being the shared intent of all the co-perpetrators).<sup>1323</sup> For example, this would be relevant where the co-perpetrators formed a common plan to murder civilians, and although each of them carried out a different role, they all shared the intent to murder civilians.
- JCE I liability involves the existence of an organised system of ill-treatment (such as a concentration camp or prison); the accused's awareness of the nature of that system; and the accused's participation in the enforcement of that system.<sup>1324</sup> For example, this would be relevant where prisoners held in a detention centre were mistreated and the accused was aware of this system and contributed to its enforcement, for example, by being in charge of the administration of the centre.
- JCE III liability renders an accused responsible for crimes falling outside the common purpose where: (i) it was *foreseeable* that such a crime might be committed by a member of the JCE (or one or more persons used by the accused or by any other member of the JCE) to further the common purpose; and (ii) the accused willingly took that risk by joining or continuing to participate in the JCE.<sup>1325</sup> For example, an accused would be liable for the crime of rape where they were part of a common plan to forcibly remove civilians from a village through the crimes of murder, torture and inhumane treatment, the accused made a contribution to this common plan, e.g., by training and deploying soldiers, and the rapes were a foreseeable consequence of the common plan.

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• Is there evidence of a common plan, design or purpose?</li> <li>• What was the geographical and temporal scope of the alleged plan?</li> <li>• Were there any similarities between the type, origins or characteristics of the victims pursued?</li> <li>• Did the accused assist in the formulation, organisation or coordination of the relevant strategy or plan?</li> </ul>	<ul style="list-style-type: none"> <li>• Official military documents detailing plans to set up a detention facility in a recently occupied village.</li> <li>• Minutes of a meeting in which the direct perpetrators discussed plans to attack and loot homes in a village.</li> <li>• Intercepted communications of the direct perpetrators planning to attack a civilian hospital.</li> <li>• Photographs and video footage of the direct perpetrators guarding civilian detainees who had been beaten.</li> <li>• Official military documents signed by the accused setting out the details of an operation to destroy cultural heritage sites in a certain location.</li> </ul>

<sup>1322</sup> *Stakić* Appeal Judgment, para. 64.

<sup>1323</sup> *Tadić* Appeal Judgment, para. 228; *Stakić* Appeal Judgment, para. 65; *Brdanin* Appeal Judgment, para. 365; *Krajišnik* Appeal Judgment, paras. 200, 707; *Stanišić & Simatović* Appeal Judgment, para. 77.

<sup>1324</sup> *Tadić* Appeal Judgment, paras 202-203; *Krnojelac* Appeal Judgment, para. 89; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeal Judgment, 25 February 2004 ('*Vasiljević* Appeal Judgment'), para. 98.

<sup>1325</sup> *Prosecutor v. Karadžić*, MICT-13-55-A, Appeal Judgment, 20 March 2019, para. 433; *Stanišić & Simatović* Appeal Judgment, para. 77; *Šainović et al.* Appeal Judgment, para. 1557; *Tadić* Appeal Judgment, para. 228; *Stakić* Appeal Judgment, para. 65; *Brdanin* Appeal Judgment, paras. 365, 411.

<ul style="list-style-type: none"> <li>• Did the accused direct or control other participants?</li> <li>• Did the accused determine the roles of those involved in the offence?</li> <li>• Did the accused supervise and/or finance resource acquisition (e.g., weapons) to commit the offence?</li> <li>• Did the accused encourage the crimes by mobilising supporters to carry out crimes against political opponents, or by rewarding physical perpetrators of crimes?</li> <li>• Did the accused mean to carry out their contribution?</li> <li>• Can the accused's intent be inferred from the surrounding circumstances?</li> <li>• Were the accused's actions deliberate and made with awareness of what they were doing?</li> <li>• Did the accused intend to further the crimes?</li> <li>• Can knowledge of the group's criminal intentions be inferred from the circumstances?</li> <li>• Were the crimes that occurred a foreseeable consequence of the accused's participation in the common plan?</li> </ul>	<ul style="list-style-type: none"> <li>• Photographs of the accused alongside other government officials where plans were drawn up to forcibly transfer the local population from an occupied territory.</li> <li>• A photograph of the accused in a meeting room with high-ranking government and military officials in which plans were drawn up for an unlawful invasion.</li> <li>• A record of a substantial import of weapons and munitions signed by the accused.</li> <li>• Official military documents displaying an order signed by the accused that the military unit should guard a detention facility.</li> <li>• Witness testimony from fellow unit members describing that the accused explicitly agreed to carry out a decoy manoeuvre on the battlefield so a criminal operation could take place.</li> <li>• Official military reports detailing the violations committed by the accused's military unit in past operations that were signed by the accused and dated prior to an operation in which this unit participated.</li> <li>• An official military document signed by the accused detailing a plan to destroy all civilian hospitals in a particular location.</li> <li>• A UN report naming the accused as the commanding authority of a detention facility where detainees were routinely mistreated.</li> </ul>
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Table 68: JCE Cues and Examples of Evidence

#### 3.4.5.2.1.2 ICC: Control Theory (Article 25(3)(a), Rome Statute)

Instead of relying on the principle of JCE developed by the *ad hoc* tribunals, the ICC has adopted the concept of *control over a crime* to hold remote or higher-level perpetrators of crime responsible as principal perpetrators.<sup>1326</sup> Under this theory, individuals who are distanced from the actual scene of a crime may be held responsible for the crime where there is a finding that they masterminded the commission of the crime because they determined whether and how the crime would be committed.<sup>1327</sup> More concretely, the perpetrators of the crime are those who controlled its

<sup>1326</sup> See e.g., *Ongwen Appeal Judgment*, para. 629; *Lubanga Appeal Judgment*, para. 469; *Prosecutor v. Bemba*, ICC-01/05-01/08, Appeal Judgment, 8 June 2018 ('*Bemba Appeal Judgment*'), para. 820; *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A A2, Appeal Judgment, 30 March 2021 ('*Ntaganda Appeal Judgment*'), para. 1041; *Katanga Trial Judgment*, para. 1396; *Lubanga Decision on the Confirmation of Charges*, para. 338; *Katanga & Chui Decision on the Confirmation of Charges*, para. 488.

<sup>1327</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Trial Judgment, 14 March 2012 ('*Lubanga Trial Judgment*'), para. 920; *Lubanga Decision on the Confirmation of Charges*, para. 330.

commission and who were aware of the factual circumstances allowing them to exert such control.<sup>1328</sup>

The ICC has recognised the following forms of commission (in addition to direct perpetration): co-perpetration; indirect perpetration; and indirect co-perpetration. Each form will be discussed, in turn, below.

**Co-perpetration (commission jointly with another):**<sup>1329</sup> An accused may be held liable by virtue of the co-perpetration mode of liability if they make, “within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime.”<sup>1330</sup> According to the ICC Appeals Chamber, the control over the crime test “is a convincing and adequate approach to distinguish co-perpetration from accessorial liability because it assesses the role of the person in question *vis-à-vis* the crime.”<sup>1331</sup>

As such, the objective element of this mode requires that the accused made an ‘essential contribution’<sup>1332</sup> to a common plan between the accused and at least one other perpetrator that would result in the commission of the relevant crime in the ordinary course of events.<sup>1333</sup> The common plan between the individuals does not need to be specifically directed at the commission of a crime,<sup>1334</sup> but must lead to the commission of one or more crimes.<sup>1335</sup> In other words, the plan must be to commit the crimes or to engage in conduct which, in the ordinary course of events, would result in the commission of the crimes.<sup>1336</sup> The common plan can be express or implied, previously arranged or materialise extemporaneously.<sup>1337</sup> Its existence can be inferred from both direct and circumstantial evidence,<sup>1338</sup> including the subsequent conduct of the accused.<sup>1339</sup>

Ultimately, whether a particular contribution was ‘essential’ will depend upon the nature and centrality of the role of, and the functions assigned to, the accused. Assessments in this regard are conducted on a case-by-case basis, considering the role of the accused in relation to the overall

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<sup>1328</sup> *Lubanga Decision on the Confirmation of Charges*, para. 31; *Katanga Trial Judgment*, para. 1396.

<sup>1329</sup> This is a form of perpetration under Article 25(3)(a) of the Rome Statute.

<sup>1330</sup> *Lubanga Appeal Judgment*, para. 469. See also, Schabas, *ICC: Commentary*, p. 570.

<sup>1331</sup> *Lubanga Appeal Judgment*, para. 469.

<sup>1332</sup> *Lubanga Appeal Judgment*, para. 473; *Katanga & Chui Decision on the Confirmation of Charges*, para. 525; *Prosecutor v. Blé Goudé*, ICC-02/11-02/11, Decision on the Confirmation of Charges, 11 December 2014 (*‘Blé Goudé Decision on the Confirmation of Charges’*), para. 135.

<sup>1333</sup> Rome Statute, Article 25(3)(a). See also, *Lubanga Appeal Judgment*, para. 445; *Lubanga Trial Judgment*, paras 980-981; *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (*‘Ongwen Trial Judgment’*), para. 2786; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2), 9 March 2015, para. 16.

<sup>1334</sup> *Lubanga Appeal Judgment*, para. 446.

<sup>1335</sup> *Lubanga Appeal Judgment*, para. 445.

<sup>1336</sup> *Ongwen Trial Judgment*, para. 2787; *Lubanga Trial Judgment*, para. 981; *Katanga Trial Judgment*, paras 1626-1627, 1630.

<sup>1337</sup> *Lubanga Appeal Judgment*, para. 446; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (*‘Ntaganda Trial Judgment’*), para. 775; *Kilolo et al. Trial Judgment*, para. 66; *Lubanga Trial Judgment*, para. 988.

<sup>1338</sup> *Kilolo et al. Trial Judgment*, para. 66; *Lubanga Trial Judgment*, para. 988.

<sup>1339</sup> *Prosecutor v. Kilolo et al.*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016 (*‘Kilolo et al. Trial Judgment’*), para. 66; *Katanga & Chui Decision on the Confirmation of Charges*, para. 301; *Prosecutor v. Kenyatta et al.*, ICC-01/09-02/11, Decision on the Confirmation of Charges, 23 January 2012, para. 400.

circumstances of the case.<sup>1340</sup> The contribution of a co-perpetrator may have been performed before or during the execution of the crime.<sup>1341</sup>

The mental elements of this mode require that the accused: (i) was aware that they provided an essential contribution; and (ii) meant to commit the material elements of the crime resulting from the common plan or they were aware that, by implementing the common plan, the crime would “occur in the ordinary course of events”.<sup>1342</sup>

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• Is there direct or physical evidence demonstrating that a plan existed (e.g., physical or digital records)?</li> <li>• Did the accused coordinate with others regarding the means necessary to achieve an objective (e.g., retaining political power)?</li> <li>• Did the accused assist in the formulation, organisation or coordination of the relevant strategy or plan?</li> <li>• Did the accused direct or control other participants?</li> <li>• Did the accused determine the roles of those involved in the offence?</li> <li>• Did the accused supervise and/or finance resource acquisition (e.g., weapons) to commit the offence?</li> <li>• Did the accused encourage the crimes by mobilising supporters to carry out crimes against political opponents, or by rewarding physical perpetrators of crimes?</li> <li>• Was the accused’s contribution such that they could have frustrated the commission of the crime by not taking part?</li> </ul>	<ul style="list-style-type: none"> <li>• An official military document detailing a plan to destroy all civilian hospitals in a particular location.</li> <li>• A video of high-ranking military generals making a public address describing a plan to take over a region of a neighbouring State.</li> <li>• A photograph of the accused in a meeting room with high-ranking government and military officials in which plans were drawn up for an unlawful invasion.</li> <li>• A record of a substantial import of weapons and munitions made by the accused.</li> <li>• Forensic ballistics evidence showing that a civilian hospital was destroyed by a precision missile strike ordered by the accused and their co-perpetrator in connection with a planned attack.</li> <li>• An official military document signed by the accused detailing a plan to destroy all civilian hospitals in a particular location.</li> </ul>

Table 69: Co-Perpetration Cues and Examples of Evidence

<sup>1340</sup> *Lubanga Trial Judgment*, paras 1000-1001.

<sup>1341</sup> *Lubanga Appeal Judgment*, paras 469, 473; *Katanga & Chui Decision on the Confirmation of Charges*, para. 526; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the Confirmation of Charges, 23 January 2012 (*Ruto et al. Decision on the Confirmation of Charges*), para. 306.

<sup>1342</sup> *Lubanga Trial Judgment*, para. 1013; *Kilolo et al. Trial Judgment*, para. 70; *Katanga & Chui Decision on the Confirmation of Charges*, para. 533; *Lubanga Decision on the Confirmation of Charges*, paras 363-364. See also, *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Confirmation of Charges, 15 June 2009 (*Bemba Decision on the Confirmation of Charges*), para. 371; *Ntaganda Appeal Judgment*, para. 1045.

**Indirect perpetration (commission through another):**<sup>1343</sup> Occurs where the accused controlled the will of those who carried out the crime.<sup>1344</sup> This can occur in two scenarios: (i) where the accused exercised control over the will of someone who bore no criminal culpability for their actions (*see* Section 3.4.5.1.1.2, above);<sup>1345</sup> or (ii) where the accused exercised control over an organised hierarchical organisation,<sup>1346</sup> meaning that the “indirect perpetrator used at least part of the apparatus of power subordinate to them, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed”.<sup>1347</sup>

According to the objective element of this mode of liability, it must be established that the accused exerted control over the crime whose material elements were brought about by one or more persons.<sup>1348</sup> In relation to an organised group, this occurs where the accused has “functional domination”<sup>1349</sup> over an organisational structure within which they can use their authority and power to ensure compliance with their orders.<sup>1350</sup> To establish that such control was present, the evidence must show:<sup>1351</sup>

1. a clear **organisational hierarchy**, within which compliance with orders was rendered nearly automatic.<sup>1352</sup> This is demonstrated in situations where, if one member of the organisation refuses to comply, another will be available to step in and secure the execution of the order(s) issued.<sup>1353</sup> The nature of the organisation – including the use of intensive, strict and violent training regimes or the routine invocation of disciplinary punishments – is also relevant;<sup>1354</sup> and

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<sup>1343</sup> This is a form of perpetration under Article 25(3)(a) of the Rome Statute.

<sup>1344</sup> *See e.g., Ongwen Appeal Judgment*, para. 628; *Lubanga Appeal Judgment*, para. 465; *Lubanga Decision on the Confirmation of Charges*, para. 332.

<sup>1345</sup> *Ongwen Appeal Judgment*, para. 628; *Katanga Trial Judgment*, para. 1402. This would occur when, for example, the direct perpetrator was a minor below the age of criminal responsibility; suffered from mental deficiency or impairment; were involuntarily intoxicated; or committed the act as “an inadvertent participant [...] acting under duress or mistake”: Cryer et al. (2015), p. 367.

<sup>1346</sup> *Katanga Trial Judgment*, para. 1408-1409: the key requirement is the “functional automatism which propels the apparatus of power”, meaning “the superior’s orders are automatically executed, at least on account of the interchangeability of the potential physical perpetrators”. *See also, Prosecutor v. Ntaganda*, ICC-01/04-02/06, *Decision on Confirmation of Charges*, 9 June 2014 (*‘Ntaganda Decision on Confirmation of Charges’*), para. 120; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-1, *Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011, para. 36; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-2-Red, *Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo*, 2 March 2012, para. 28.

<sup>1347</sup> *Ongwen Appeal Judgment*, para. 631; *Ongwen Trial Judgment*, para. 2784. *See also, Katanga Trial Judgment*, paras 1403-1406, 1411-1412; *Ntaganda Trial Judgment*, para. 778.

<sup>1348</sup> Rome Statute, Article 25(3)(a); *Katanga Trial Judgment*, paras 1399, 1416.

<sup>1349</sup> Cryer et al. (2015), p. 368.

<sup>1350</sup> *Katanga & Chui Decision on the Confirmation of Charges*, para. 514. In these situations, although it is likely that those directly committing the crime will bear criminal culpability, it is possible that certain direct perpetrators could be absolved of criminal responsibility. *See, Katanga Trial Judgment*, para. 1404.

<sup>1351</sup> *Katanga Trial Judgment*, para. 1412.

<sup>1352</sup> *Katanga Trial Judgment*, para. 1408; *Ntaganda Decision on Confirmation of Charges*, para. 120.

<sup>1353</sup> *Katanga Trial Judgment*, para. 1408.

<sup>1354</sup> *Katanga & Chui Decision on the Confirmation of Charges*, para. 518.

2. that, within this hierarchy, the accused genuinely exerted “**control over the course of events occasioning the crime**” by conceiving the crime, overseeing its preparation at different hierarchical levels and/or controlling its performance and execution through the organisational apparatus.<sup>1355</sup>

The mental elements of this mode require that the accused: (i) met the mental elements for the crime committed (*see* Section 3.3); and (ii) was aware of the factual circumstances which allowed them to exert control over the crime through others.<sup>1356</sup> At a minimum, this requires that the accused was aware of the organisational structure that enabled them to use another person to realise the material elements of the crime.<sup>1357</sup>

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• Was there an organised, hierarchical apparatus of power, such as a political or military structure?</li> <li>• Did the accused have the rank or position to give orders to subordinates?</li> <li>• Are there circumstances that indicate there was automatic execution of the accused’s orders?</li> <li>• Did the organisation use intensive, strict and violent training regimes, or other disciplinary punishments?</li> <li>• Could the accused hire, terminate or impose discipline on subordinates?</li> <li>• Did the accused hold a rank/position that allowed them to give orders to subordinates?</li> <li>• Was the accused involved in training subordinates?</li> <li>• Did the accused have knowledge of the organisational and hierarchical structure of the organisation?</li> <li>• Was the accused aware of the circumstances fundamental to their exertion of control over the crime?</li> </ul>	<ul style="list-style-type: none"> <li>• An order appointing the accused as the head of the military unit.</li> <li>• Official documents displaying the accused’s signature on orders to discipline or terminate the employment of members of the organisation.</li> <li>• Witness testimony describing how those subordinated to the accused were violently punished for refusing to carry out orders.</li> <li>• A photograph of the accused alongside other high-level members of an organisation.</li> <li>• A video of the accused leading training sessions with subordinates.</li> <li>• Documents showing the internal hierarchy of an organisation signed by the accused.</li> <li>• Witness testimony from lower ranking members of the organisation describing how the accused would frequently order subordinates to carry out criminal activities.</li> <li>• Photographic evidence that the accused oversaw training and discipline of the members of the organisation.</li> </ul>

Table 70: Indirect Perpetration Cues and Examples of Evidence

**Indirect co-perpetration** (commission jointly with another and through another person):<sup>1358</sup> The objective elements of this mode require: (i) the existence of a common plan between the accused and

<sup>1355</sup> *Katanga Trial Judgment*, para. 1412.

<sup>1356</sup> Rome Statute, Article 25(3)(a); *Ongwen Appeal Judgment*, para. 249; *Katanga Trial Judgment*, para. 1399, 1413-1415.

<sup>1357</sup> *Katanga Trial Judgment*, para. 1415.

<sup>1358</sup> This is a form of perpetration under Article 25(3)(a) of the Rome Statute. This is a combination of the co-perpetration and indirect perpetration modes of liability.



co-perpetrators to commit the crimes or engage in conduct which would lead to their occurrence in the ordinary course of events; (ii) the control by co-perpetrator(s) over persons who execute the crime by subjugating the will of the direct perpetrators (including an organised power apparatus through the automatic functioning of the apparatus); and (iii) the accused, although not required to carry out the criminal conduct themselves, makes an essential contribution to it and has the resulting power to frustrate its commission.<sup>1359</sup>

The mental elements of this mode require that the accused: (i) must have intended their essential contribution; (ii) must have been mutually aware and accepted that the implementation of the common plan would result in the commission of the crimes; and (iii) was aware of the factual circumstances enabling them to exercise joint control over the commission of the crime through another person.<sup>1360</sup>

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>Is there direct or physical evidence demonstrating that a plan existed (e.g., physical or digital records)?</li> <li>Did the accused coordinate with others regarding the means necessary to achieve an objective (e.g., retaining political power)?</li> <li>Did members of the group undertake other preparatory activities (e.g., stockpiling weapons)?</li> <li>What was the nature and content of the interactions between the accused, other co-perpetrators and forces under their control?</li> <li>Did the accused assist in the formulation, organisation or coordination of the relevant strategy or plan?</li> <li>Did the accused direct or control other participants?</li> <li>Did the accused determine the roles of those involved in the offence?</li> <li>Did the accused supervise and/or finance resource acquisition (e.g., weapons) to commit the offence?</li> </ul>	<ul style="list-style-type: none"> <li>An official military document detailing a plan to destroy all civilian hospitals in a particular location.</li> <li>A video of high-ranking military generals making a public address describing a plan to take over a region of a neighbouring State.</li> <li>Photographs taken during a meeting between high-level military/government personnel in which plans were drawn up for a large-scale military operation.</li> <li>Digital records of large weapons purchases by a member of the group.</li> <li>A photograph of the accused in a meeting room with high-ranking government and military officials in which plans were drawn up for an unlawful invasion.</li> <li>An order appointing the accused as the head of the military unit.</li> <li>Official documents displaying the accused's signature on orders to discipline or terminate the employment of members of the organisation.</li> <li>Witness testimony describing how those subordinated to the accused were violently punished for refusing to carry out orders.</li> <li>A photograph of the accused alongside other high-level members of an organisation.</li> <li>A video of the accused leading training sessions with subordinates.</li> </ul>

<sup>1359</sup> See e.g., *Ongwen Appeal Judgment*, para. 637-8; *Ongwen Trial Judgment*, para. 2787-2788; *Ntaganda Trial Judgment*, para. 774; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11, Decision on the Confirmation of Charges, 23 January 2012 ('*Muthaura et al. Decision on the Confirmation of Charges*'), paras 297-298; *Ntaganda Decision on Confirmation of Charges*, para. 104, 121; *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 213.

<sup>1360</sup> *Ongwen Trial Judgment*, para. 2788; *Ntaganda Trial Judgment*, para. 774.

<ul style="list-style-type: none"> <li>• Did the accused have the rank or position to give orders to subordinates?</li> <li>• Are there circumstances that indicate there was automatic execution of the accused's orders?</li> </ul>	
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Table 71: Indirect Co-Perpetration Cues and Examples of Evidence

### 3.4.5.3 Accessory Liability

Accessory liability is a form of criminal responsibility an accused can incur for the criminal actions of another person if the accused has a sufficient connection to, or participation in, the crime.<sup>1361</sup> Both the CCU and the international courts and tribunals have recognised several forms of accessory liability relevant to international crimes.

#### 3.4.5.3.1 Accessory Liability under the CCU

The three accessory liability provisions under the CCU are set out in Article 27 as follows:

#### **Article 27. Types of accomplices**

3. An organiser shall mean person who has organised a criminal offence (or criminal offences) or supervised its (their) preparation or commission. An organiser shall also mean a person who has created an organised group or criminal organisation, supervised it, funded it, or organised the covering up of the criminal activity of an organised group or criminal organisation.

4. An abettor shall mean a person who has induced any other accomplice to a criminal offence, by way of persuasion, subornation, threat, coercion or otherwise.

5. An accessory shall mean a person who has facilitated the commission of a criminal offence by other accomplices, by way of advice, instructions, or by supplying the means or tools, or removing obstacles, and also a person who promised in advance to cover up a criminal offence, tools or means, traces of crime or criminally obtained things, to buy or sell such things, or otherwise facilitate the covering up of a criminal offence.

Articles 29(2) to (5) of the CCU provide further clarification on the criminal liability of accomplices under the CCU.

#### **Article 29. Criminal liability of accomplices**

2. An organiser, abettor and accessory shall be criminally liable under the respective part of Article 27 and the Article (part of the Article) of the Special Part of this Code that provides for the offence committed by a principal offender.

3. The features of character of a specific accomplice shall be criminated only upon such accomplice. Other circumstances that aggravate responsibility and are provided for by Articles of the Special Part hereof as the elements of a crime that affect the treatment of the principal offender's actions, shall be criminated only upon the accomplice who was conscious of such circumstances.

4. Should a principal offender commit an unconsummated criminal offence; other accomplices shall be criminally liable for complicity in an unconsummated crime.

<sup>1361</sup> See e.g., Thomson Reuters Practical Law, 'Accessorial liability' (2023).

5. Accessories shall not be criminally liable for the act committed by the principal offender, provided there was no part of their intent in that act.

Accordingly, Articles 27(3) to (5) of the CCU cover three types of accessory liability: organising, abetting and being an accessory, while Articles 26 and 29(5) provide that the organiser, abettor or accessory must have the intent that the crime be committed, which is shared with the principal. Article 29(2) explains that the organiser, abettor or accessory are criminally liable under the relevant paragraph of Article 27 and the article setting out the criminal offence. As discussed below (*see* Section 3.4.5.3.2), similar conduct is captured by the modes of liability recognised under ICL, an examination of which can provide guidance on the application of these modes in the context of atrocity and conflict-related crimes.

#### 3.4.5.3.1.1 Organising (Article 27(3), CCU)

According to Article 27(3) of the CCU, the objective elements of this mode of liability require the organiser to: (i) organise the commission of a crime(s) or supervise its preparation or commission; or (ii) create an organised group or criminal organisation, supervise it, finance it, or organise the cover-up of the criminal activity of an organised group or criminal organisation.<sup>1362</sup>

The mental elements of this mode require that the organiser intended the act constituting the criminal offence to be committed. This is confirmed by Article 29(5) which states: “accomplices shall not be criminally liable for an act committed by the principal, where that act was not part of their intent”. In relation to organisers who create organised groups or criminal organisations, Article 30(1) confirms: “[a]n organiser of an organised group or criminal organisation shall be criminally liable for all the criminal offences committed by the organised group or criminal organisation, *if those were part of his intent*”.

The following are of forms of ‘organising’ according to Ukrainian practice:<sup>1363</sup>

- Engaging perpetrators, accomplices or other organisers in the commission of the crime;
- Distributing responsibilities between perpetrators, accomplices or other organisers;
- Otherwise pooling and coordinating efforts of accomplices and perpetrators (e.g., their placement/presence at the crime scene, determining the sequence of criminal acts, the form and procedure of communication between the accomplices during the crime’s commission);
- Determining the object of the offence;
- Developing a plan to commit a crime;
- Finding or adapting the means or instruments/tools for the crime’s commission;
- Ordering the commission of a crime;
- Removal of obstacles to the commission of a crime;

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<sup>1362</sup> CCU, Article 27(3).

<sup>1363</sup> Resolution of the Supreme Court of Ukraine “On the Practice of Consideration by Courts of Criminal Cases of Crimes Committed by Sustainable Criminal Associations” of 23 December 2005 No. 13, para. 3; P. Andrushko, T. Arsenyuk and V. Tykhyi, Scientific and practical commentary to the Criminal Code of Ukraine (2009), *Commentary to Article 27 of the CCU* (Andrushko, Arsenyuk & Tykhyi, *Commentary to Article 27 of the CCU*).

- Creating other pre-conditions for the commission of a crime;
- Instructing accomplices to commit relevant criminal acts (through actions or inactions);
- Developing measures to neutralise the activities of law enforcement agencies (e.g., through bribery, violence against employees or their relatives, their removal, or other blocking of their activities that may prevent the commission of a crime); or
- Determining the places to hide the accomplices after they have committed a crime, as well as places to conceal weapons, the means of committing the crime, traces of the crime, objects obtained by criminal means, etc.

Based on these types of conduct, an organiser's contribution to international crimes can vary depending on the nature of the crime, manner of its commission, types of forces involved, etc. In cases of low-level incidents of violence (e.g., murder of individual civilians, looting, etc.), it is unlikely that an organiser's role will differ from the circumstances surrounding ordinary crimes under the CCU. For example, where a soldier organises his fellow servicemen to loot local civilian houses for personal gain – i.e., by devising a plan and allocating means (e.g., vehicles and arms) for these purposes – they can qualify as organisers.

However, the situation is more intricate in cases of multi-episode or prolonged incidents, or in connection with, for instance, the complex coordination of an attack (e.g., sieges of towns by different units), complicated planning or decision-making processes (e.g., the use of strategic aviation), or attacks involving the use of modern sophisticated weapons (e.g., multiple-rocket artillery or ground ballistic complexes). In such cases, those contributing to crimes might not seem to fit into the previously developed understanding of the form of 'organising' under the CCU, which were more applicable to ordinary crimes (e.g., banditism, money laundering, etc.). Nonetheless, the wording of Article 27(3) – combined with previous judicial practice in Ukraine – is broad enough to encompass the multitude of ways that mid- and high-level perpetrators may be involved in organising the commission of international crimes (which have also been considered under various modes of liability by the international courts and tribunals – *see* Section 3.4.5.3.2).

Examples of situations where the person involved could potentially qualify as an 'organiser' include:

- A high-level politician who directed civilians fleeing violence to an area where they knew civilians were being attacked and who also sent armed reinforcements to that area to contribute to the attack.<sup>1364</sup>

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<sup>1364</sup> *See e.g., Prosecutor v. Kalimanzira*, ICTR-05-88-T, Trial Judgment, 22 June 2009, paras 392-393. In this case, the Trial Chamber found that Kalimanzira personally encouraged thousands of civilians to take refuge in an area where he promised they would be protected. Instead of being protected, the civilians were attacked and killed in the presence of Kalimanzira, who also sought police and military reinforcements to assist in the attack. Accordingly, the Trial Chamber found Kalimanzira guilty of aiding and abetting genocide. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

- An armed soldier who accompanied two other armed soldiers (the direct perpetrators) and a number of detainees to an area where the direct perpetrators shot and killed the detainees.<sup>1365</sup>
- A commanding officer issuing an order for the withdrawal of his soldiers who were guarding POWs which provided paramilitary forces unrestrained physical access to the POWs and, thus, facilitated their murder.<sup>1366</sup>
- A mid-level officer who assembled police to launch an attack on a village during which time civilians were murdered and subjected to cruel treatment and civilian houses were destroyed (e.g., set ablaze).<sup>1367</sup>
- A leader of a group of soldiers who took women from a detention centre to a secondary location where they were further detained and raped by other soldiers.<sup>1368</sup>
- A commander of a detention facility who failed to provide adequate food, water, medical, toilet and sleeping facilities to detainees, despite no indication that resources were limited (i.e., organised inadequate facilities), thereby subjecting detainees to inhuman conditions and causing their wilful suffering and cruel treatment.<sup>1369</sup>

At the same time, in many war crimes cases, the mode of organising will overlap with the mode of ordering (i.e., a form of commission under Article 438 of the CCU (*see* Section 3.4.5.4, below)). This can be the case where, for example, an artillery unit commander orders their subordinates to shell a residential area of a town with the knowledge of the civilian status of the targets, but also contributes to the attack by planning it, assigning tasks to the artillery machine operators, placing the operators

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<sup>1365</sup> See e.g., *Vasilijević Appeal Judgment*, para. 134. A portion of this case related to an incident during which Vasilijević accompanied three of his fellow soldiers, who had captured seven Muslim men, to an area where these Muslim men were shot. While Vasilijević did not carry out the murder of these men himself, he was armed and stood by as his fellow soldiers shot the men. Accordingly, the Appeals Chamber found Vasilijević guilty of aiding and abetting murder. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

<sup>1366</sup> See e.g., *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, *Trial Judgment*, 27 September 2007 (*Mrkšić et al. Trial Judgment*), paras 612, 620-622. In this case, the Trial Chamber found that Mrkšić's order for the withdrawal of the only remaining soldiers guarding a group of POWs "had an immediate and direct effect on the commission of the murders that followed". The Trial Chamber therefore found that Mrkšić aided and abetted the commission of the crime of murder. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

<sup>1367</sup> *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-A, *Appeal Judgment*, 19 May 2010 (*Boškoski & Tarčulovski Appeal Judgment*), paras 130, 135, 138, 150, 153-154, 157. In this case, Tarčulovski was found responsible for instigation on the basis of evidence suggesting (i) that he was responsible for the preparation of the operation with the predominant objective to indiscriminately attack civilians and their property; (ii) that he personally led this operation; (iii) that he was present in the village while the crimes were committed; and (iv) that he authorized the police members not to conduct an inspection in respect of the deaths of three men. For a detailed discussion of instigating, *see* Section 3.4.5.3.2.2, below.

<sup>1368</sup> See e.g., *Kunarac et al. Trial Judgment*, paras 21, 22, 26, 28-33, 636-670. Amongst other offences, Kunarac, the commander of a volunteer unit of soldiers, was found guilty of aiding and abetting torture and rape by bringing girls to, and leaving them in, a house containing soldiers from his unit, knowing that the girls would then be raped. This occurred in the context of the military take-over of a town, where civilians were being held in various long- and short-term detention facilities across town. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

<sup>1369</sup> *Prosecutor v. Delalić et al.*, IT-96-21-T, *Trial Judgment*, 16 November 1998 (*Delalić et al. Trial Judgment*), paras 1073-1119, 1123. The Trial Chamber here found Mucić, one of the accused, responsible directly and as a superior/commander for wilfully causing great suffering or serious injury to the body or health of detainees as well as for their cruel treatment, based on his *de facto* position of superior authority over the Čelebići prison-camp and that "by virtue of this position [Mucić] was the individual with primary responsibility for, and the ability to affect, the conditions in the prison-camp". For a detailed discussion of principal (direct) liability and command responsibility, *see* Sections 3.4.5.1 and 3.4.5.5.

in particular locations, etc. In other words, in many cases where commanders order the commission of war crimes, they are likely to also play an additional role in orchestrating their preparation by finding the means, distributing responsibilities and tasks, etc.

Organising does not have an exact replication in the modes of liability recognised under ICL. However, organising under Article 27(3) of the CCU can be used to cover similar conduct as that captured by indirect perpetration or indirect co-perpetration (*see* Section 3.4.5.2.1.2), planning (*see* Section 3.4.5.3.2.1) and ordering (*see* Section 3.4.5.4), and in some circumstances, aiding and abetting (*see* Section 3.4.5.3.2.3) or contributing in any other way to the commission of a crime (*see* Section 3.4.5.3.2.4).

#### 3.4.5.3.1.2 *Abetting (Article 27(4), CCU)*

Article 27(4) refers to abettors who have “induced any other accomplice to a criminal offence, by way of persuasion, subornation, threat, coercion or otherwise”. In other words, abetting under the CCU involves instigating the crime through arousing the desire (belief in the desirability, profitability, need), causing the determination, or strengthening the intention of the direct perpetrator to commit a crime.<sup>1370</sup>

The mental element of this mode requires, in line with Article 29(5), the abettor to have the requisite intent for the act committed by the principal (i.e., the criminal offence).

According to the CCU, the following are methods of persuading an accomplice to commit a crime:<sup>1371</sup>

- **Persuasion** – the systematic or one-time request of a person in need to commit a crime;
- **Bribery** – the provision or promise of material (money, property, transfer or preservation of property rights, exemption from property obligations, etc.) or other aid (employment assistance, solving certain life problems, exemption from criminal liability, etc.) in return for committing a crime;
- **Threat** – the intimidation of a person by threatening to cause physical, property, moral or other harm if they do not commit a crime;
- **Coercion** – soliciting another person to commit a crime by inflicting bodily harm or using other violence, damaging property belonging to them or their relatives, disseminating certain information about such a person, etc.; and
- **Inclination in another way** – the commission of any other acts by which the person incites the accomplice to commit the crime, including: instructions, orders, advice, appeals, etc.

This mode may be useful in capturing the responsibility of remote perpetrators of international crimes in cases where they have exerted influence on the direct perpetrators to commit the crimes including, for example: those who have created an environment within their unit where the commission of crimes is encouraged; those who have requested others to commit crimes; or those who have solicited others to commit crimes through coercion. This mode of liability covers similar

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<sup>1370</sup> Andrushko, Arsenyuk & Tykhyi, *Commentary to Article 27 of the CCU*.

<sup>1371</sup> Andrushko, Arsenyuk & Tykhyi, *Commentary to Article 27 of the CCU*.



conduct as the modes of liability of instigating, soliciting or inducing (*see* Section 3.4.5.3.2.2), and aiding and abetting (*see* Section 3.4.5.3.2.3) recognised by international courts and tribunals.

#### 3.4.5.3.1.3 *Acting as an Accessory (Article 27(5), CCU)*

Under Article 27(5), the objective elements of this mode of liability provide that an ‘accessory’ is a person who either:<sup>1372</sup> (i) facilitated the commission of a criminal offence by other accomplices by providing advice, instructions, supplying the means or tools, or removing obstacles; or (ii) promised in advance to conceal a criminal offence, tools or means used for the crime’s commission, traces of the crime or things obtained as a result of the crime, as well as to buy or sell such things, or otherwise facilitate the covering up of the crime.

The mental element of this mode requires, in accordance with Article 29(5), that the accessory have the intent for the act committed by the principal (i.e., the criminal offence).

Examples where a person could be viewed as acting an ‘accessory’ include:

- A high-ranking administrative leader in a municipality who contributed to the continuation of a forced labour program by appointing the head of the relevant municipal department that was responsible for the program and who facilitated prisoner exchanges by appointing members of a prisoner exchange committee and by being consulted about the prisoner exchanges.<sup>1373</sup>
- The commander of a military engineering unit who provided his unit’s resources and equipment to mass execution sites to excavate burial sites.<sup>1374</sup>
- A senior pastor who conveyed an armed attacker to a complex where the attackers then killed civilians.<sup>1375</sup>
- An army chief who provided and supplied military equipment to local forces who committed crimes, including deportation and forcible transfer.<sup>1376</sup>

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<sup>1372</sup> CCU, Article 27(5).

<sup>1373</sup> *Prosecutor v. Simić et al.*, IT-95-9-A, *Appeal Judgment*, 28 November 2006, paras. 153-155, 182-184, 189. In this case, Simić, the President of the Bosanski Šamac Municipal Board in Bosnia and Herzegovina, was found guilty of aiding and abetting the crime of persecutions of non-Serb civilians through their unlawful arrest and detention, forced labour and forced displacement. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

<sup>1374</sup> *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, *Trial Judgment*, 17 January 2005, (*Blagojević & Jokić Trial Judgment*), paras 357, 567(j), 763, 766-767, 769-775. Jokić, Chief of Engineering and Engineering Company Commander in the Army of Republika Srpska, was found guilty of aiding and abetting the mass executions of 2,700-4,200 victims by virtue of his sending and monitoring the deployment of Zvornik Brigade resources and equipment to mass execution sites to excavate burial sites. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

<sup>1375</sup> *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10 & ICTR-96-17-T, *Judgment and Sentence*, 21 February 2003, paras. 788-790. Ntakirutimana conveyed armed attackers to the Mugonero Complex in his vehicle and these attackers proceeded to kill Tutsi refugees at the Complex. The accused knew that members of the Tutsi ethnicity were being targeted for attack, and that by transporting the attackers to the complex, he would be assisting in the attack. He was accordingly convicted of aiding and abetting the killing of and causing serious bodily or mental harm to the Tutsi victims. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

<sup>1376</sup> *Prosecutor v. Šainović et al.*, IT-05-87-T, *Trial Judgment: Volume 3 of 4*, 26 February 2009 (*Šainović et al. Trial Judgment: Volume 3 of 4*), paras 623-630. Ojdanić, Chief of the General Staff of the Yugoslav Army, was found guilty of aiding and abetting the deportation and forcible transfer of Albanian civilians by virtue of, *inter alia*, his arming of the non-Albanian population in Kosovo. For a detailed discussion of aiding and abetting, *see* Section 3.4.5.3.2.3, below.

This mode of liability finds similarities to aiding and abetting (*see* Section 3.4.5.3.2.3) and to contributing in any other way to the commission or attempted commission of a crime (*see* Section 3.4.5.3.2.4) recognised by the international courts and tribunals.

#### 3.4.5.3.2 *Accessory Liability under ICL*

As mentioned above, in addition to its inclusion in the CCU, accessory liability is also recognised in customary international law and the instruments and practice of the international courts and tribunals.<sup>1377</sup> Accordingly, this section will discuss the following modes of accessory liability: planning; instigating, soliciting or inducing; aiding and abetting; and other contributions to crimes.

##### 3.4.5.3.2.1 *Planning (Article 7(1), ICTY Statute; Article 6(1), ICTR Statute)*

Planning is specifically listed as a mode of liability in the statutes of the ICTY and ICTR,<sup>1378</sup> and is recognised under customary international law.<sup>1379</sup> However, planning is not recognised as a mode of liability under the Rome Statute, instead such conduct would likely be subsumed under the modes of liability of co-perpetration<sup>1380</sup> (*see* Section 3.4.5.2.1.2) and other contributions to crimes (*see* Section 3.4.5.3.2.4).

According to the jurisprudence of the ICTY and ICTR, the objective element of ‘planning’ requires that one or more persons “design the criminal conduct constituting one or more” crimes that are later perpetrated.<sup>1381</sup> This may involve “formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime” which is later perpetrated.<sup>1382</sup> It is sufficient to demonstrate that the planning was a factor that substantially contributed to such criminal conduct.<sup>1383</sup> In addition, it is not required to prove the accused’s presence at the crime scene to show that crimes were committed under the accused’s direction or according to their plan.<sup>1384</sup>

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<sup>1377</sup> *See e.g.*, Rome Statute, Article 25(3)(b)-(d); ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).

<sup>1378</sup> ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).

<sup>1379</sup> *See e.g.*, *Prosecutor v. Šainović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, para. 21: due to the fact that one of the preconditions for a mode of liability to come within the ICTY’s jurisdiction is that, *inter alia*, “it must have existed under customary international law at the relevant time”.

<sup>1380</sup> At the ICC, the notion of liability by virtue of planning was discussed in the context that a co-perpetrator could make an essential contribution to the common plan at any stage, including the planning stage, *see: Ntaganda Appeal Judgment*, paras 22, 24, 1066; *Lubanga Appeal Judgment*, paras 7, 469; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016 (*‘Bemba Trial Judgment’*), para. 69; *Blé Goudé Decision on the Confirmation of Charges*, para. 134; *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Arrest Warrant Decision, 22 May 2018, para. 170. ICC Judge Christine Van den Wyngaert has also noted that “[p]lanning” is also contained in several draft versions of this Court’s Statute, where it appears alongside the language of what becomes Article 25(3)(a) of the Statute: *Prosecutor v. Chui*, ICC-01/04-02/12-4, Judgment pursuant to Article 74 of the Statute - Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, p. 10, fn. 22.

<sup>1381</sup> *Prosecutor v. Kordić and Čerkez*, ICTY-95-14/2A, Appeal Judgment, 17 December 2004 (*‘Kordić and Čerkez Appeal Judgment’*), para. 26; *Prosecutor v. Milošević*, IT-98-29/1-A Appeal Judgment, 12 November 2009 (*‘Milošević Appeal Judgment’*), para. 268.

<sup>1382</sup> *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (*‘Semanza Judgment and Sentence’*), para. 380.

<sup>1383</sup> *Kordić and Čerkez Appeal Judgment*, para. 26; *Milošević Appeal Judgment*, para. 268.

<sup>1384</sup> *Boškoski and Tarčulovski Appeal Judgment*, para. 125.

The mental elements of this mode require the individual planning the act to have had “the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime [would] be committed in the execution of the acts or omissions planned”.<sup>1385</sup>

Much of the conduct that would amount to ‘planning’ could be subsumed under the mode of liability of ‘organising’ under Article 27(3) of the CCU (*see* Section 3.4.5.3.1.1). A number of the different forms of organising recognised by Ukrainian practice – including distributing responsibilities, determining the object of the offence, developing a plan to commit a crime, finding or adapting the means/instruments/tools for the crime’s commission – can be interpreted to include conduct assigned under ‘planning’ before the *ad hoc* tribunals and under customary international law. As to the *mens rea*, where crimes can be committed with indirect intent (i.e., where the accused foresaw socially dangerous consequences and, although they did not wish for them, they *consciously assumed their occurrence*), they can also arguably encompass the lower ICL standard (“awareness of the substantial likelihood that a crime [would] be committed in the execution of the acts or omissions planned”).

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• Did the accused assist in the formulation, organisation, planning or coordination of the crime?</li> <li>• Did the accused direct or control other participants?</li> <li>• Did the accused determine the roles of those involved in the offence?</li> <li>• Did the accused organise, supervise and/or finance resource acquisition (e.g., weapons) to commit the offence?</li> <li>• Did the accused fund the execution of the crimes?</li> <li>• Did the accused encourage the crimes by mobilising supporters to carry out crimes, or by rewarding physical perpetrators of crimes?</li> <li>• Was the accused’s contribution such that they could have frustrated the commission of the crime by not taking part?</li> <li>• Did the accused mean to carry out their contribution?</li> <li>• Can the accused’s intent be inferred from the surrounding circumstances?</li> <li>• Were the accused’s actions deliberate and made with</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony by a member of the accused’s military unit that the accused maintained a tight chain of command within his unit and was actively engaged in making decisions on issues for his unit (e.g., unit composition, weapon selection) and in planning their activities (e.g., sniping campaigns, the deployment and use of weapons).</li> <li>• Minutes of a meeting during which a plan was devised to attack a civilian town reflecting the accused’s role in the planning of this operation (e.g., by arranging fire support from another unit, by ensuring the forces were properly armed, and by indicating the accused would lead the operation himself).</li> <li>• A photograph of the accused in a meeting room with high-ranking government and military officials in which plans were drawn up for an unlawful invasion.</li> <li>• A record of a substantial import of weapons and munitions made by the accused.</li> <li>• An NGO report naming the accused as a high-ranking member of a paramilitary group with a reputation for looting civilian homes after military operations.</li> <li>• Witness testimony from members of a paramilitary unit stating that the accused was responsible for sourcing weapons for specific operations.</li> <li>• NGO reports listing the accused as one of the key members of a paramilitary organisation.</li> <li>• Witness testimony from victims stating that it would be impossible for an individual not to be aware of a paramilitary group’s aim to drive out members of a certain ethnicity from an area.</li> </ul>

<sup>1385</sup> *Kordić and Čerkez Appeal Judgment*, para. 31; *Milošević Appeal Judgment*, para. 273; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, *Appeal Judgment*, 28 November 2007 (*‘Nahimana et al. Appeal Judgment’*), para. 479.

awareness of what they were doing?	<ul style="list-style-type: none"> <li>• A list of attendees (including the accused) at a meeting among members of the occupation administration in which plans to forcibly remove the local population were formulated.</li> </ul>
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Table 72: Planning Cues and Examples of Evidence

#### 3.4.5.3.2.2 Instigating, Soliciting, Inducing (Article 23(3)(b), Rome Statute; Article 7(1), ICTY Statute; Article 6(1), ICTR Statute)

The statutes of the *ad hoc tribunals* contain the mode of liability of ‘instigating’,<sup>1386</sup> while the Rome Statute refers to ‘soliciting or inducing’.<sup>1387</sup> These modes of liability cover functionally the same conduct, however there are some differences between their interpretation.

The objective elements first require that the accused: ‘promoted’ or ‘urged or encouraged’ someone to commit a crime (‘instigating’),<sup>1388</sup> exerted influence over a direct perpetrator through strong reasoning, persuasion or any other conduct which prompted such person to commit a crime (‘inducing’);<sup>1389</sup> or asked or urged the direct perpetrator to commit the criminal act (‘soliciting’).<sup>1390</sup> In addition, there must be a causal link between the instigation, inducement or solicitation and the crime committed. Before the ICC it is required that the inducement/solicitation had a *direct effect* on the commission or attempted commission of the crime;<sup>1391</sup> whereas the *ad hoc tribunals* required the instigation to have *substantially contributed* to the commission of the crime.<sup>1392</sup> It is not a requirement that the prosecution “prove that the crime or underlying offence would not have been perpetrated but for the accused’s prompting”.<sup>1393</sup>

The instigation, inducement or solicitation can be explicit or implicit,<sup>1394</sup> and may include different forms such as speeches or creating an environment permissive of the commission of crime by subordinates, such as by giving *carte blanche* to commit crimes, by setting an example through the accused’s own conduct, or through notorious and persistent tolerance.<sup>1395</sup> No superior-subordinate relationship between the accused and the direct perpetrator is required.<sup>1396</sup> The influence is generally of a psychological nature (e.g., persuasion, enticement or promises), but may also take the form of

<sup>1386</sup> ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).

<sup>1387</sup> Rome Statute, Article 25(3)(b).

<sup>1388</sup> *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, 3 March 2000 (‘*Blaškić Trial Judgment*’), para. 280; *Kordić and Čerkez Appeal Judgment*, para. 27; *Limaj et al. Trial Judgment*, para. 514; *Bagilishema Appeal Judgment*, para. 30.

<sup>1389</sup> *Kilolo et al. Trial Judgment*, para. 76.

<sup>1390</sup> *Kilolo et al. Trial Judgment*, para. 75.

<sup>1391</sup> Rome Statute, Article 25(3)(b); *Ntaganda Decision on Confirmation of Charges*, para. 153. See also, Brammertz & Jarvis, *Prosecuting CRSV*, p. 235, citing *Kordić and Čerkez Appeal Judgment*, para. 27. This means that the accused’s actions must have prompted the direct perpetrator to commit the crime: *Prosecutor v. Kilolo et al.*, ICC-01/05-01/13 A A2 A3 A4 A5, Appeal Judgment, 8 March 2018 (‘*Kilolo et al. Appeal Judgment*’), para. 848; *Kilolo et al. Trial Judgment*, para. 81.

<sup>1392</sup> *Šainović et al. Trial Judgment: Volume 1 of 4*, para. 83; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001 (‘*Kvočka et al. Trial Judgment*’), para. 252; *Nahimana et al. Appeal Judgment*, para. 480.

<sup>1393</sup> *Šainović et al. Trial Judgment: Volume 1 of 4*, para. 84; *Kvočka et al. Trial Judgment*, para. 252; *Nahimana et al. Appeal Judgment*, para. 480.

<sup>1394</sup> *Šainović et al. Trial Judgment: Volume 1 of 4*, para. 83; *Tolimir Trial Judgment*, para. 902.

<sup>1395</sup> Brammertz & Jarvis, *Prosecuting CRSV*, p. 235, citing *Galić Trial Judgment*, para. 168. See also, A. Aranburu, ‘Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases’ (2010) 23 *Leiden JIL*, pp. 609, 614.

<sup>1396</sup> *Kilolo et al. Trial Judgment*, para. 77; *Prosecutor v. Orić*, IT-03-68-T, Trial Judgment, 30 June 2006 (‘*Orić Trial Judgment*’), para. 272.

physical pressure (e.g., coercion or threats) as long as the persuaded/coerced person still has the freedom to act and decide whether or not to commit the crime.<sup>1397</sup>

The mental element of this mode differs between the ICC and the *ad hoc* tribunals. The ICC requires that the accused was aware that the crimes would be committed in the ordinary course of events.<sup>1398</sup> Before the *ad hoc* tribunals, on the other hand, the accused must have intended to provoke or induce the commission of the crime, or have been aware of the substantial likelihood that the commission of a crime would be a probable consequence of their acts.<sup>1399</sup>

Instigation, inducement or solicitation are comparable to ‘abetting’ under Article 27(4) of the CCU (see Section 3.4.5.3.1.2), which includes inducing another person to commit a crime “by way of persuasion, subordination, threat, coercion or otherwise”. While ‘abetting’ exists as a distinct mode of liability under ICL (discussed in more detail below, see Section 3.4.5.3.2.3), the type of conduct covered by ‘abetting’ under the CCU – in particular, ‘persuasion’, ‘coercion’ and ‘threat’ – would appear to more closely relate to instigating, soliciting or inducing. The relevant *mens rea* considerations are the same as for ‘abetting’ under the CCU. Particularly where crimes can be committed with indirect intent (i.e., where the accused foresaw socially dangerous consequences and although, they did not wish for them, they consciously assumed their occurrence), they can also arguably encompass the lower ICL standard (“awareness of the substantial likelihood that the commission of a crime would be a probable consequence of their acts.”).

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• Did the accused ask, urge or influence the direct perpetrator to commit a criminal act?</li> <li>• Was the influence psychological in nature (e.g., by persuasion, enticement or promises)?</li> <li>• Was the influence physical in nature (e.g., through coercion or threats)?</li> <li>• Is there a causal link between the instigation and the criminal act?</li> <li>• Did the accused’s actions prompt the commission of the criminal act?</li> <li>• Was the criminal act that was committed a foreseeable consequence of that inducement?</li> <li>• Did the accused reveal an intent to induce the crime through their actions?</li> <li>• Did the conduct solicited by the accused necessitate the commission of crimes by the direct perpetrator?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony from a member of a military unit stating that the accused urged them to kill civilians.</li> <li>• Witness testimony from a soldier that when he joined a military unit in an occupied town the accused (an experienced soldier) advised him that a necessary step to becoming a real patriot and soldier was going into the town and killing a civilian.</li> <li>• A video clip of the accused, a local politician, making a public speech urging the crowd to steal from the local civilian population, and promising them they could keep the goods.</li> <li>• Witness testimony from a direct perpetrator describing how they would not have tortured a POW had it not been for the accused’s influence.</li> <li>• Video footage of a group of soldiers entering a home to loot directly after the accused urged them to do so.</li> </ul>

<sup>1397</sup> O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn, C.H. Beck, Hart, Nomos 2016) (“Triffterer & Ambos, *Commentary*”), p. 1003; *Prosecutor v. Šešelj*, MICT-16-99-A, Appeal Judgment, 11 April 2018, para. 124.

<sup>1398</sup> Rome Statute, Article 25(3)(b); *Ntaganda Decision on Confirmation of Charges*, para. 153; Brammertz & Jarvis, *Prosecuting CRSV*, p. 235, citing *Kordić & Čerkez Appeal Judgment*, para. 27.

<sup>1399</sup> *Kordić & Čerkez Appeal Judgment*, paras 29, 32; *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004 (‘*Brdanin Trial Judgment*’), para. 269; *Naletilić & Martinović Trial Judgment*, para. 60.



<ul style="list-style-type: none"> <li>• Did the accused reveal an intent to induce the crime through their actions?</li> <li>• Did the conduct solicited by the accused necessitate the commission of crimes by the direct perpetrator?</li> </ul>	<ul style="list-style-type: none"> <li>• Evidence from Human Rights Watch that the crimes occurred directly after the accused made a public address requesting their commission.</li> <li>• A photograph of the accused pointing a gun towards the direct perpetrator before they committed a sexual crime.</li> <li>• Witness testimony from a paramilitary member describing how the accused would explicitly encourage unit members to rape and sexually assault civilians.</li> <li>• A video of a public address given by the accused in which they state that the local population must be removed from an occupied territory.</li> <li>• An intercepted communication sent by the accused to troops in the field encouraging the use of captured enemy soldiers as human shields.</li> </ul>
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Table 73: *Instigating, Soliciting, Inducing Cues and Examples of Evidence*

#### 3.4.5.3.2.3 Aiding and Abetting (Article 25(3)(c), Rome Statute; Article 7(1), ICTY Statute; Article 6(1), ICTR Statute)

Under ICL, an accused may incur responsibility for aiding, abetting or otherwise assisting in the commission of a crime.<sup>1400</sup>

The objective element of this mode of liability under ICL requires that the accused aided, abetted or otherwise assisted in the commission of the crime or its attempted commission, including by providing the means for its commission.<sup>1401</sup> This assistance can be by an act or omission and may be given before, during or after the offence has been perpetrated.<sup>1402</sup> Such assistance may take the form of practical (or material) aid,<sup>1403</sup> encouragement,<sup>1404</sup> or the expression of sympathy for the commission of a crime.<sup>1405</sup> It is not essential that the accused was personally present during the

<sup>1400</sup> Rome Statute, Article 25(3)(c); ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).

<sup>1401</sup> *Kilolo et al.* Trial Judgment, paras 83-84; *Kilolo et al.* Appeal Judgment, para. 1325; *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Decision on the Confirmation of Charges Against Ahmad Al Faqi Al Mahdi, 24 March 2016, para. 26; *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges Against Dominic Ongwen, 23 March 2016 (*Ongwen Decision on the Confirmation of the Charges*), para. 43; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgment, 24 March 2000, paras 163, 165; *Popović et al.* Appeal Judgment, para. 1732; *Orić* Trial Judgment, paras 269, 282, 288; *Blagojević and Jokić* Trial Judgment, para. 726; *Semanza* Judgment and Sentence, paras 385, 388.

<sup>1402</sup> *Kilolo et al.* Trial Judgment, para. 96; *Blagojević and Jokić* Trial Judgment, para. 726.

<sup>1403</sup> *Kilolo et al.* Trial Judgment, para. 88; *Popović et al.* Appeal Judgment, para. 1732; *Kvočka et al.* Trial Judgment, para. 253; *Mrkšić et al.* Trial Judgment, para. 551; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009 (*Sesay et al.* Trial Judgment), para. 276; *Prosecutor v. Taylor*, SCSL-03-01-1281, Trial Judgment, 18 May 2012 (*Taylor Trial Judgment*), fn.1136.

<sup>1404</sup> Encouragement need not to be explicit, and will include situations in which the accused is present at the scene of the crime as a 'silent spectator' capable of providing tacit encouragement "by [their] mere presence and authority": *Kilolo et al.* Trial Judgment, para. 89; *Prosecutor v. Kayishema et al.*, ICTR-95-1-A, Appeal Judgment, 1 June 2001 (*Kayishema et al.* Appeal Judgment), paras 201-202; *Semanza* Judgment and Sentence, para. 385; *Prosecutor v. Ngirabatware*, MICT-12-29-A, Appeal Judgment, 18 December 2014, para. 150.

<sup>1405</sup> *Kilolo et al.* Trial Judgment, para. 89; *Popović et al.* Appeal Judgment, para. 1732; *Mrkšić et al.* Trial Judgment, para. 551; *Kvočka et al.* Trial Judgment, para. 254; *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998 (*Furundžija Trial Judgment*), para. 231; ; *Prosecutor v. Akeyesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (*Akeyesu Trial Judgment*), para. 484; *Sesay et al.* Trial Judgment, paras 276-277; *Taylor Trial Judgment*, fn. 1136.



commission of the offence.<sup>1406</sup> In addition, an accused may still be held liable for aiding and abetting where they provided their support indirectly through an intermediary, for example, when operating in a chain of command.<sup>1407</sup>

Before the ICC, there is no minimum threshold of assistance that needs to be met in order to establish an accused's liability for aiding and abetting, nor are there any strict requirements regarding the effect of the assistance upon the commission of the crime. Ultimately, whether or not an accused's conduct amounts to 'assistance' will depend upon the facts of each case, including the role of the accused in relation to that of the direct perpetrator(s).<sup>1408</sup> However, before the *ad hoc* tribunals, "[t]he assistance need not have caused the act of the principal, but it must have had a 'substantial effect' on the commission of the crime".<sup>1409</sup>

The mental elements of this mode differ between the ICC and the *ad hoc* tribunals:

- Before the ICC, the evidence must demonstrate that the accused's acts were carried out "[f]or the purpose of facilitating the commission of such a crime".<sup>1410</sup> It is not sufficient that the accused merely *knows* that their conduct will assist in the commission of the crime.<sup>1411</sup> This may be demonstrated by, for example, evidence of the accused's explicit encouragement of the commission of the crime.<sup>1412</sup> In other cases, however, an accused may have little or no knowledge of the crimes if the direct perpetrator(s) are far removed from the accused and retain a high degree of autonomy over their activities.<sup>1413</sup> In addition to this specific mental element, it must also be demonstrated that the accused had the requisite intent and knowledge in relation to the crime in question.<sup>1414</sup> This means that the accused must have at least been aware that the direct perpetrator's offence would occur in the ordinary course of events.<sup>1415</sup>

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<sup>1406</sup> *Kilolo et al.* Trial Judgment, para. 96; *Orić* Trial Judgment, para. 282; *Furundžija* Trial Judgment, para. 209; *Kayishema et al.* Appeal Judgment, para. 201; *Rutaganda* Trial Judgment, para. 43.

<sup>1407</sup> *Kilolo et al.* Appeal Judgment, para. 1330; *Kilolo et al.* Trial Judgment, para. 96; *Orić* Trial Judgment, para. 282; *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeal Judgment, 9 May 2007 ('*Blagojević and Jokić* Appeal Judgment'), para. 127; *Popović et al.* Appeal Judgment, para. 1784.

<sup>1408</sup> *Kilolo et al.* Appeal Judgment, para. 1327; *Kilolo et al.* Trial Judgment, para. 93; *Ongwen* Decision on the Confirmation of Charges, para. 43.

<sup>1409</sup> *Blagojević and Jokić* Trial Judgment, para. 726 (emphasis added); *Popović et al.* Appeal Judgment, para. 1732; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016 ('*Karadžić* Trial Judgment'), para. 576; *Furundžija* Trial Judgment, para. 235; *Rutaganda* Trial Judgment, para. 43.

<sup>1410</sup> *Ongwen* Decision on the Confirmation of Charges, para. 43.

<sup>1411</sup> *Kilolo et al.* Trial Judgment, para. 97.

<sup>1412</sup> Schabas, ICC: *Commentary*, p. 579.

<sup>1413</sup> See e.g., *Prosecutor v. Yekatom*, ICC-01/14-01/18, Decision on the Confirmation of Charges, 11 December 2019, para. 164, where the ICC Pre-Trial Chamber was unable to confirm aiding and abetting charges because "the Prosecutor failed to prove that the Anti-Bakala groups operating in areas far removed from the capital of Bangui were under the effective control of members of the National Coordination, including Ngaïssona. While the concerned Anti-Balaka groups were formally and politically under the umbrella of the National Coordination [...], they retained a high degree of autonomy in terms of operational matters, so much that the members of the National Coordination – most notably Ngaïssona – had limited, if any, knowledge and control over their criminal actions".

<sup>1414</sup> *Kilolo et al.* Trial Judgment, para. 98.

<sup>1415</sup> *Kilolo et al.* Trial Judgment, para. 98.

- Before the *ad hoc* tribunals, on the other hand, the mental element requires that the accused act “with the knowledge that his or her act(s) assist in the commission of the crime by the actual perpetrator(s)”.<sup>1416</sup> However, it is not a requirement that the accused knew the precise crime that was intended or the one that was actually committed; it is sufficient that they were aware that one of a number of crimes would probably be committed, provided that one of those crimes was in fact committed.<sup>1417</sup>

While ‘abetting’ is a distinct mode of liability under Article 27(4) of the CCU (*see* Section 3.4.5.3.1.2), abetting in that context appears to have a different meaning from its meaning under ICL. Indeed, abetting under Article 25(4) of the CCU is defined as “persuasion, subordination, threat [or] coercion”, and is thus more closely aligned with the ‘instigating, soliciting or inducing’ mode of liability under ICL (*see* Section 3.4.5.3.2.2). However, Article 27(4) also mentions that abetting can be committed by other forms, leaving the list non-exhaustive. Thus, certain categories of assistance falling under ‘aiding and abetting’ as it is defined under ICL could be charged as abetting under the CCU. The provision of material aid and assistance, however, would be more appropriately prosecuted as ‘acting as an accessory’ under Article 27(5) (*see* Section 3.4.5.3.1.3), which includes the facilitation of crimes through “advice, or instructions, or by supplying the means or tools, or removing obstacles”.

Pursuant to Article 26, acting as an abettor or an accessory under the CCU requires that the perpetrator intended the crimes. This is most closely aligned with the ICC’s requirement that the assistance be given “[f]or the purpose of facilitating the commission of such a crime”. However, where crimes can be committed with indirect intent (i.e., where the accused foresaw socially dangerous consequences and although, they did not wish for them, they consciously assumed their occurrence), they can also arguably encompass the lower *ad hoc* tribunal standard (“with the knowledge that his or her act(s) assist in the commission of the crime by the actual perpetrator(s)”).

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• What assistance was given toward the commission of a crime?</li> <li>• Was the assistance provided by the accused’s conduct?</li> <li>• Did the accused implicitly encourage the commission of a crime through their presence and authority?</li> <li>• Did the accused fail to prevent the direct perpetrator from committing the criminal act where they had an obligation to do so?</li> </ul>	<ul style="list-style-type: none"> <li>• Policy documents signed by the accused signifying that weapons would be transferred to a military unit ahead of operations in which war crimes were committed.</li> <li>• Intercepted communications sent by the accused to members of a military unit encouraging members of the unit to pillage civilian property after taking over a town.</li> <li>• Witness testimony from a direct perpetrator describing how the accused supplied them with flags of truce and told them to use them for unlawful purposes.</li> <li>• Transport documents listing the accused as the driver of a bus that transported civilians from one State to a filtration camp in another State.</li> </ul>

<sup>1416</sup> *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (*Kajelijeli Judgment and Sentence*), para. 768; *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Judgment, 30 May 2013, (*Stanišić and Simatović Trial Judgment: Vol. II*), para. 1264; *Orić Trial Judgment*, para. 288.

<sup>1417</sup> *Stanišić and Simatović Trial Judgment: Vol. II*, para. 1264; *Kajelijeli Judgment and Sentence*, para. 768; *Orić Trial Judgment*, para. 288.

<ul style="list-style-type: none"> <li>• Did the accused intend that their assistance would aid the commission of a crime?</li> <li>• Did the accused oversee the performance or execution of the crime?</li> <li>• Was the assistance provided specifically to facilitate the crime?</li> <li>• What role did the accused play in relation to the seriousness and scope of the crimes committed?</li> </ul>	<ul style="list-style-type: none"> <li>• A photograph or video of a soldier guarding a house where his fellow soldiers had taken a woman to be raped.</li> <li>• A video of a public address made by the accused during which they state that lethal aid will be sent to members of a paramilitary group who later used those weapons to attack civilians.</li> <li>• Witness testimony from a member of a military unit describing how the accused, despite being the unit commander, stood by while members of the unit looted civilian homes following an operation.</li> <li>• Video footage of the accused giving a public address detailing plans to “liberate” a region of a neighbouring State by driving out members of a particular national group.</li> <li>• Documents showing that the accused gave weapons to detention centre guards for the purpose of facilitating crimes.</li> </ul>
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Table 74: *Aiding, Abetting or Otherwise Assisting Cues and Examples of Evidence*

#### 3.4.5.3.2.4 Other Contribution to Crimes (Article 25(3)(d), Rome Statute)

Under Article 25(3)(d) of the Rome Statute, an accused may be held liable for ‘other contributions to crimes’ where they intentionally contribute to the commission or attempted commission of a crime in conjunction with another group of persons acting with a common purpose. Practitioners should note that this is not considered a mode of liability under the statutes of the ICTY or the ICTR.

The objective elements of this crime require that: (i) the direct perpetrators who attempted or committed a crime belonged to a group acting with a common purpose; and (ii) the accused contributed to the crime in any way other than those identified in Articles 25(3)(b) to (c) of the Rome Statute (i.e., other than by ordering, soliciting, inducing, or aiding and abetting).<sup>1418</sup>

The group of persons acting according to a common purpose need not be organised in a military, political or administrative structure,<sup>1419</sup> and there is no requirement to prove that the accused was a member of this group.<sup>1420</sup> The common purpose of the group must involve an element of criminality, i.e., to commit a crime, or to commit a crime in the ordinary course of events.<sup>1421</sup> This can be established through evidence of the group’s collective decisions, acts or omissions.<sup>1422</sup> However, it is not necessary that the common purpose was previously arranged or formulated – it may have come about with little preparation and can be inferred from the subsequent concerted acts of the group.<sup>1423</sup>

<sup>1418</sup> Rome Statute, Article 25(3)(d); *Katanga Trial Judgment*, paras 1620, 1624; *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision transmitting additional legal and factual material, 15 May 2013, para. 16; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011 (*Mbarushimana Decision on the Confirmation of Charges*), fn. 640; *Muthaura et al.* Decision on the Confirmation of Charges, para. 421; *Ruto et al.* Decision on the Confirmation of Charges, para. 351; *Ntaganda Decision on Confirmation of Charges*, para. 158.

<sup>1419</sup> *Katanga Trial Judgment*, para. 1626.

<sup>1420</sup> *Katanga Trial Judgment*, para. 1631.

<sup>1421</sup> *Katanga Trial Judgment*, paras 1626-1627, 1630.

<sup>1422</sup> *Katanga Trial Judgment*, para. 1627.

<sup>1423</sup> *Katanga Trial Judgment*, para. 1626.

Contributions to the common purpose may be made either by members of the group or persons outside the group.<sup>1424</sup> The accused's contribution must have a *material effect* on the commission of the crime to satisfy this mode of liability.<sup>1425</sup> As such, although it need not be the sole determining factor in the commission of that crime,<sup>1426</sup> contributions cannot be general, inconsequential or trivial in nature.<sup>1427</sup> Nevertheless, it is not a requirement that the accused physically perpetrated the crime,<sup>1428</sup> and their contribution may be connected to either the physical elements of the crimes (i.e., provision of weapons), or to the mental elements (i.e., encouragement).<sup>1429</sup>

The mental element of this mode requires the accused to have meant to engage in the contribution.<sup>1430</sup> Moreover, the contribution must be made with the aim of furthering the common criminal purpose, where such purpose involves the commission of the crime or, in the alternative, it must be made with knowledge of the group's intention to commit the crime.<sup>1431</sup> An accused may only be held responsible for crimes that the group committed or attempted with the intention of realising the common purpose.<sup>1432</sup> For instance, the accused would not incur liability for opportunistic acts by the members of the group that do not have any connection to the common purpose.<sup>1433</sup>

Since this mode of liability requires a group of persons to act with a common purpose, conduct falling under this mode may fall under Articles 28(2) to (4) of the CCU, which, as discussed in Section 3.4.5.2.1, require an offence committed by a group of persons or an organised/criminal group to act in accordance with a prior conspiracy or common plan, in connection with the relevant mode of liability under Article 27. Like 'other contributions' under the Rome Statute, Article 28 of the CCU does not specify the precise type of individual contributions that are necessary to find a person liable as a member of a criminal group/organisation.

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>• Is there evidence of a pre-arranged plan?</li> <li>• If not, can the existence of a plan be inferred from the group's actions or omissions?</li> <li>• What was the geographical and temporal scope of the alleged plan?</li> <li>• Were there any similarities between the type, origins or characteristics of the victims pursued?</li> </ul>	<ul style="list-style-type: none"> <li>• Minutes of a meeting in which the direct perpetrators discussed plans to attack and loot homes in a village.</li> <li>• Intercepted communications of the direct perpetrators planning to attack a civilian hospital.</li> <li>• Photographs and video footage of the direct perpetrators guarding civilian detainees and repeatedly beating them.</li> <li>• Witness testimony from members of a paramilitary unit stating that the accused was responsible for sourcing GRAD MLRS for specific operations.</li> <li>• Policy documents signed by the accused authorising the purchase of prohibited weapons.</li> </ul>

<sup>1424</sup> *Katanga Trial Judgment*, para. 1631; *Mbarushimana Decision on the Confirmation of Charges*, paras 272, 275.

<sup>1425</sup> *Katanga Trial Judgment*, paras 1633-1634.

<sup>1426</sup> *Katanga Trial Judgment*, paras 1633-1634.

<sup>1427</sup> *Katanga Trial Judgment*, para. 1632.

<sup>1428</sup> *Katanga Trial Judgment*, para. 1635.

<sup>1429</sup> *Katanga Trial Judgment*, para. 1635.

<sup>1430</sup> Rome Statute, Article 25(3)(d); *Katanga Trial Judgment*, paras 1632, 1637-1639; *Mbarushimana Decision on the Confirmation of Charges*, para. 288.

<sup>1431</sup> Rome Statute, Article 25(3)(d).

<sup>1432</sup> *Katanga Trial Judgment*, para. 1628-1630.

<sup>1433</sup> *Katanga Trial Judgment*, para. 1630.

<ul style="list-style-type: none"> <li>• What were the identities of the victims (e.g., common profession, religion, political views, etc.)?</li> <li>• What role did the accused play in relation to the seriousness and scope of the crimes committed?</li> <li>• Did the accused mean to carry out their contribution?</li> <li>• Can the accused's intent be inferred from the surrounding circumstances?</li> <li>• Were the accused's actions deliberate and made with awareness of what they were doing?</li> <li>• Did the accused intend to further the crimes?</li> <li>• Can knowledge of the group's criminal intentions be inferred from the circumstances?</li> <li>• What was the proximity between the accused and the group?</li> <li>• Did the accused have a close relationship to the criminal group?</li> </ul>	<ul style="list-style-type: none"> <li>• Witness testimony by a soldier in the accused's unit that the accused used his influence, rank and relationship with military leaders in the region to provide ammunition and weapons to a commander of a different unit who had planned an operation to execute civilian leaders and activists in the region.</li> <li>• Official military documents displaying an order signed by the accused that the military unit should guard a detention facility.</li> <li>• Witness testimony from fellow unit members describing that the accused explicitly agreed to carry out a decoy manoeuvre on the battlefield so a criminal operation could take place.</li> <li>• Video footage of the accused giving a public address detailing plans to "liberate" the nationals of a region of a neighbouring State by launching an attack on that State.</li> <li>• Photographs of the accused alongside other government officials where plans were drawn up to forcibly transfer the local population from an occupied territory.</li> <li>• A list of attendees (including the accused) at a meeting among members of the occupation administration in which plans to forcibly remove the local population were formulated.</li> <li>• Widely disseminated open-source reports describing the criminal intentions of a paramilitary organisation.</li> <li>• Witness testimony from victims stating that it would be impossible for an individual not to be aware of a paramilitary group's aim to drive out members of a certain ethnicity from an area.</li> </ul>
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Table 75: Other Contributions to Crimes Cues and Examples of Evidence

#### 3.4.5.4 Ordering the Commission of a War Crime as a Form of Perpetration under Article 438 of the CCU

International crimes are often committed by direct perpetrators on the orders of a superior.<sup>1434</sup> While 'ordering' forms a distinct mode of liability under ICL,<sup>1435</sup> under Ukrainian law this mode of liability is incorporated into Article 438, which criminalises "giving an order" to commit the acts described in this provision, namely "cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of methods of warfare prohibited by international instruments, or any other violations of rules of the warfare recognised by international instruments consented to as binding by the Verkhovna Rada" (see Sections 3.2.15 to 3.2.47 for a detailed discussion of war crimes under ICL and the CCU). In other words, ordering the commission of a war crime gives rise to the principal liability of the perpetrator in the same way as the commission of the war crime itself.

Given the lack of prior jurisprudence on cases involving Article 438, especially with the involvement of commanders, the concept of 'ordering' has not received extensive interpretation to date. In addition, the provision does not further specify which conduct would fall under 'ordering', what

<sup>1434</sup> Cryer et al. (2015), p. 359.

<sup>1435</sup> See e.g., Rome Statute, Article 25(3)(b).



forms the orders can take, what *mens rea* is required, etc. Therefore, the interpretation of ordering as a mode of liability by the international courts and tribunals can assist practitioners in determining the scope of this provision.

3.4.5.4.1 Ordering under ICL (Article 25(3)(b), Rome Statute; Article 7(1), ICTY Statute; Article 6(1), ICTR Statute)

Ordering covers situations in which an accused (i.e., a person in a position of authority) gives an order to a subordinate to commit a crime, and that subordinate goes on to commit that crime.<sup>1436</sup>

The objective elements of ordering require that: (i) the accused was in a position of *de jure* or *de facto* authority;<sup>1437</sup> (ii) the accused gave an instruction to commit a crime or to perform an act or omission in the course of which a crime was carried out;<sup>1438</sup> and (iii) there was a causal link between the instruction and the commission of the crime.<sup>1439</sup>

While the accused must have been in a position of authority,<sup>1440</sup> meaning there was a superior-subordinate relationship that gave the accused some level of control over the direct perpetrator at the time they issued the order,<sup>1441</sup> this position does not need to be legal, formal or permanent.<sup>1442</sup> Further, the instruction need not be written or given in any particular form, and may be passed down the chain of command, rather than given directly by the accused to the direct perpetrator(s).<sup>1443</sup> The existence of an instruction can be proven through circumstantial evidence, such as the existence of a large number of similar offences contemporaneously occurring within the same defined area.<sup>1444</sup>

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<sup>1436</sup> Rome Statute, Article 25(3)(b); ICTY Statute, Article 7(1); ICTR Statute, Article 6(1). See also, *Akayesu* Trial Judgment, para. 483; *Blaškić* Trial Judgment, para. 281; *Kordić and Čerkez* Appeal Judgment, para. 28; *Prosecutor v. Mudacumura*, ICC-01/04-01/12, Decision on the Prosecutor's Application under Article 58, 13 July 2012 ('*Mudacumura* Decision on the Prosecutor's Application under Article 58'), para. 63; *Ntaganda* Decision on Confirmation of Charges, para. 145; *Prosecutor v. Gbagbo*, ICC-02/11/01/11, Decision on Confirmation of Charges, 12 June 2014 ('*Gbagbo* Decision on Confirmation of Charges'), para. 244.

<sup>1437</sup> *Ntaganda* Decision on Confirmation of Charges, para. 145; *Kordić and Čerkez* Appeal Judgment, para. 28; *Gacumbitsi* Appeal Judgment, paras 181-183; *Limaj et al.* Trial Judgment, para. 515; *Galić* Trial Judgment, para 168; *Krstić* Trial Judgment, para. 601; *Akayesu* Trial Judgment, para. 483; *Rutaganda* Trial Judgment, para. 39.

<sup>1438</sup> *Mudacumura* Decision on the Prosecutor's Application under Article 58, para. 63; *Ntaganda* Decision on Confirmation of Charges, para. 145; *Karadžić* Trial Judgment, para. 573; *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgment, 30 November 2006 ('*Galić* Appeal Judgment'), para. 176; *Kordić and Čerkez* Appeal Judgment, para. 28; *Gacumbitsi* Appeal Judgment, paras 181-183; *Limaj et al.* Trial Judgment, para. 515; *Galić* Trial Judgment, para 168; *Krstić* Trial Judgment, para. 601; *Akayesu* Trial Judgment, para. 483; *Rutaganda* Trial Judgment, para. 39.

<sup>1439</sup> *Mudacumura* Decision on the Prosecutor's Application under Article 58, para. 63; *Ntaganda* Decision on Confirmation of Charges, para. 145; *Gbagbo* Decision on Confirmation of Charges, para. 244; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Judgment, 26 February 2009 ('*Milutinović et al.* Trial Judgment'), para. 88; *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgment, 31 January 2005 ('*Strugar* Trial Judgment'), para. 332; *Nahimana et al.* Appeal Judgment, para. 481.

<sup>1440</sup> *Ntaganda* Decision on Confirmation of Charges, para. 145; *Kordić and Čerkez* Appeal Judgment, para. 28; *Gacumbitsi* Appeal Judgment, paras 181-183.

<sup>1441</sup> *Akayesu* Trial Judgment, para. 483; *Blaškić* Trial Judgment, para. 278; *Ntaganda* Decision on Confirmation of Charges, para. 120; *Prosecutor v. Semanza*, ICTR-97-2, Appeal Judgment, 20 May 2005 ('*Semanza* Appeal Judgment'), para. 361; *Prosecutor v. Niyiramasuhuko et al.*, Appeal Judgment, para. 1915.

<sup>1442</sup> *Ntaganda* Decision on Confirmation of Charges, fn. 598; *Karadžić* Trial Judgment, para. 573; *Semanza* Appeal Judgment, para. 361.

<sup>1443</sup> *Karadžić* Trial Judgment, para. 573; *Mudacumura* Decision on the Prosecutor's Application under Article 58, para. 63.

<sup>1444</sup> *Boškoski & Tarčulovski* Appeal Judgment, para. 164; *Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Appeal Judgment, 19 September 2005, para. 74; *Galić* Appeal Judgment, paras 170-171; *Prosecutor v. Hategikimana*, ICTR-00-55B-A, Appeal Judgment, 8 May 2012, para. 67.



International courts and tribunals have also required there to be a causal link between the instruction and the crime committed. Before the ICC, it must be established that the order had a *direct effect* on the commission or attempted commission of the crime.<sup>1445</sup> Whereas, the *ad hoc* tribunals require that the accused's order was a factor that *substantially contributed* to the commission of the crime.<sup>1446</sup> Nevertheless, neither the ICC nor the *ad hoc* tribunals require the order to be the sole cause of the crime.<sup>1447</sup>

In relation to the mental elements of this mode, the jurisprudence of the ICC and the *ad hoc* tribunals recognise that it is sufficient to establish that the accused was at least aware that the crime would be committed as a consequence of their instruction.<sup>1448</sup> Before the ICC, the accused must have “at least been aware that the offence(s) would be committed ‘in the ordinary course of events’ as a consequence of the realisation of his or her act or omission”.<sup>1449</sup> The jurisprudence of the *ad hoc* tribunals, on the other hand, provides a lower threshold requiring that “an act or omission [was ordered] with the awareness of the *substantial likelihood* that a crime will be committed in the execution of that order.”<sup>1450</sup>

In some cases, it will be possible to establish that the accused *intended* the commission of the crime. For example, the accused may explicitly instruct or persuade the direct perpetrator to commit the offence.<sup>1451</sup> This can include, for example, an order to torture civilians to obtain information on the movement of enemy forces. However, in the reality of armed conflicts, especially in State armed forces with their formality and discipline, commanders rarely issue direct or express orders to commit crimes, e.g., to execute or rape civilians, or to specifically target civilian buildings with artillery. Even if they do, such evidence is extremely difficult to obtain: the higher-up the commander or political leader is, the more difficult, if not impossible, it will be. More commonly, perpetrators will issue indirect or implicit orders, requiring an assessment of whether they were aware that the crime would be committed as a consequence of their instruction.

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>What was the accused's role within the organisation/hierarchy in which they operate?</li> </ul>	<ul style="list-style-type: none"> <li>Witness testimony from several members of the armed forces describing that the accused occupied a position of unofficial authority, and routinely gave out orders which were carried out.</li> </ul>

<sup>1445</sup> *Mudacumura* Decision on the Prosecutor's Application under Article 58, para. 63; *Ntaganda* Decision on Confirmation of Charges, para. 145; *Gbagbo* Decision on Confirmation of Charges, para. 244.

<sup>1446</sup> *Milutinović et al.* Trial Judgment, para. 88; *Strugar* Trial Judgment, para. 332; *Nahimana et al.* Appeal Judgment, para. 481.

<sup>1447</sup> *Milutinović et al.* Trial Judgment, para. 88; *Strugar* Trial Judgment, para. 332; *Ntaganda* Decision on Confirmation of Charges, para. 145.

<sup>1448</sup> *Ntaganda* Decision on Confirmation of Charges, para. 145; *Kordić and Čerkez* Appeal Judgment, para. 30.

<sup>1449</sup> *Kilolo et al.* Trial Judgment, para. 82; *Ntaganda* Decision on Confirmation of Charges, para. 153; *Mudacumura* Decision on the Prosecutor's Application under Article 58, para. 63. This may be established, for example, by demonstrating that the accused “knew with certainty” that the accused would carry out the crime through their prior conduct. See, *Kilolo et al.* Trial Judgment, para. 857: “having directed and approved the eliciting coaching of witnesses, and having organised the payments and other assistance to the witnesses prior to their testimonies, Mr Bemba knew with certainty that Mr Kilolo would instruct the witnesses accordingly, and that the witnesses would, in turn, untruthfully testify in court as a consequence of his conduct”.

<sup>1450</sup> *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgment, 29 July 2004, para. 42; *Kordić and Čerkez* Appeal Judgment, para. 30.

<sup>1451</sup> *Kilolo et al.* Trial Judgment, para. 861.

<ul style="list-style-type: none"> <li>• Was there a chain of command or reporting, even if informal?</li> <li>• Was it normal for individuals within the chain of command to act outside of that chain?</li> <li>• Is there direct evidence of orders being given (e.g., physical or digital copies)?</li> <li>• Can the existence of an order be inferred from circumstantial evidence (e.g., because there was a large number of similar actions carried out over a defined area)?</li> <li>• What was the nature of the order that was given (i.e., did it involve criminal acts)?</li> <li>• What was the nature of the crime that allegedly followed the issuance of the order?</li> <li>• Did the accused make any prior statements showing that the objective of their order was the commission of crimes?</li> <li>• What were the overall circumstances of the crime?</li> <li>• Did the execution of the order necessitate the commission of crimes?</li> </ul>	<ul style="list-style-type: none"> <li>• NGO reports naming the accused as the leader of a paramilitary group notorious for criminal activity.</li> <li>• Witness testimony from a prisoner in a detention facility explaining how all guards followed the accused's orders.</li> <li>• Official military documents recording an order given by the accused to their subordinates.</li> <li>• A digital intercepted message sent from the accused to troops in the field ordering them to carry out an operation.</li> <li>• An official military document containing an order signed by the accused.</li> <li>• A video of the accused giving a public address in which they state that they have ordered the armed forces to carry out an act of aggression.</li> <li>• Witness testimony from soldiers stating that the accused ordered them to carry out an attack against a civilian target.</li> <li>• Forensic ballistics evidence showing that a civilian hospital was destroyed by a precision missile strike ordered by the accused.</li> <li>• Witness testimony from detainees at a detention centre describing that the accused would order subordinates to elicit confessions "by whatever means necessary".</li> <li>• Intercepted phone conversations between soldiers in the accused's unit revealing that the accused provided them a vague order to assist another unit with an attack on civilians and giving no exact description of the type of assistance they were to provide, despite the accused's knowledge that the other unit was committing crimes against civilians.</li> <li>• Witness testimony from the accused's subordinates that, after occupying a town, the accused ordered his unit to go door to door looking for men of military age and to take those men to the local high school gymnasium for "processing".</li> <li>• Intercepted calls between a soldier and his commander, the accused, in which the accused ordered his soldier to help transport a group of soldiers to a town and "to stay just in case there's any trouble and deal with it in the way you know how".</li> </ul>
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*Table 76: Ordering Cues and Examples of Evidence*

### **3.4.5.5 Command Responsibility**

Command/superior responsibility refers to the responsibility of military commanders or civilian superiors for crimes committed by forces or subordinates acting under their command, authority and control, which occurred because of their failure to exercise proper control over those forces/subordinates.<sup>1452</sup> Responsibility of military commanders and civilian superiors for failure to prevent and punish crimes committed by their subordinates is codified in Articles 86 and 87 of Additional Protocol I and is a well-established principle of customary international humanitarian law ('IHL').<sup>1453</sup>

<sup>1452</sup> Cryer et al. (2015), p. 368.

<sup>1453</sup> Additional Protocol I, Article 86(2); ICRC, Customary IHL Database, Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes.

<b>Command Responsibility under IHL</b>	
<b>Additional Protocol I, Article 86 Failure to Act</b>	<p>1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.</p> <p>2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.</p>
<b>Additional Protocol I, Article 87 Duty of commanders</b>	<p>1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.</p> <p>2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.</p> <p>3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.</p>
<b>Customary IHL, Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes</b>	Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

Table 77: Command Responsibility under IHL

The critical role that commanders and superiors play in the enforcement of the rules of IHL and military discipline,<sup>1454</sup> as well as the fact that commanders are often those most responsible for the commission of crimes due to their acquiescence to patterns of criminal activity implemented by their subordinates, makes clear the importance of this principal and is reflected in its use by international courts and tribunals to hold military commanders responsible.<sup>1455</sup>

<sup>1454</sup> K. Ambos, *Treatise on International Criminal Law Volume I: Foundations and General Part* (1<sup>st</sup> edn, OUP, 2013), p. 198.

<sup>1455</sup> See e.g., U.S. Supreme Court, *In re Yamashita*, 327 U.S. 1 (1946); Nuremberg Military Tribunal I, *Karl Brandt et al. Judgment*, p. 212: “the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war”; ICTY Statute, Article 7(3), *Delalić et al. Trial Judgment*, paras 333-343, 346,

Under IHL and ICL, command responsibility exists in dual, mutually complementary forms:<sup>1456</sup>

- as a mode of liability (e.g., as enshrined under Article 28(a) of the Rome Statute); and
- as a distinct criminal offence (i.e., a violation of a commander's 'duty to act').

As will be discussed below, the CCU does not currently refer to failure to act (i.e., command responsibility) for military commanders (other than in relation to Ukrainian military commanders<sup>1457</sup>) as either a mode of liability or a separate criminal offence. Nonetheless, such conduct can fall under Article 438 as it is codified in Additional Protocol I,<sup>1458</sup> i.e., a "violation of the rules of warfare recognised by international instruments consented to as binding by the Verkhovna Rada".

#### 3.4.5.5.1 *Command Responsibility under the CCU*

While Article 426 of the CCU provides for the criminal responsibility of Ukrainian military authorities for omissions – i.e., "wilful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute criminal proceedings against a subordinate offender, and also wilful failure of a military officer to act in accordance with his/her duties" – this crime constitutes a military crime (a crime against the established procedure of military service) and, thus, only Ukrainian commanders may be held responsible under this provision.<sup>1459</sup> As such, it is currently not possible to prosecute Russian military commanders for their failure to act in Ukraine to prevent, suppress or punish violations of IHL committed by their subordinates.

Nonetheless, Article 438 does offer the possibility of incorporating the separate offence of failure to act into the CCU by virtue of Articles 86 and 87 of Additional Protocol I, as the failure to act by military commanders is itself a "violation of the rules of warfare recognised by international instruments consented to as binding by the Verkhovna Rada". Such an interpretation would overcome the current disparity whereby Ukrainian commanders can be prosecuted for their omissions while Russian commanders cannot.

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Disposition; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Appeal Judgment, 22 April 2008 ('*Hadžihasanović and Kubura Appeal Judgment*'); ICTR Statute, Article 6(3); *Prosecutor v. Hategekimana*, ICTR-00-55B-T, Judgment and Sentence, 6 December 2010; *Prosecutor v. Bizimungu*, ICTR-00-56B-A, Appeal Judgment, 30 June 2014; Rome Statute, Article 28, *Bemba Trial Judgment*; UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16 January 2000) S/RES/1315 ('SCSL Statute'), Article 6(3); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('ECCC Law'), Article 29.

<sup>1456</sup> C. Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5 *Journal of International Criminal Justice* 619 (Meloni, 'Command Responsibility'), p. 624. See also, D. Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13 *Melbourne Journal of International Law* 1 (Robinson, 'How Command Responsibility Got So Complicated').

<sup>1457</sup> Failure to act by Ukrainian military superiors is currently criminalised under Article 426 of the CCU, which criminalises 'Omissions of military authorities', namely "[w]ilful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender, and also wilful failure of a military official to act in accordance with his/her official duties, if it caused any significant damage".

<sup>1458</sup> Additional Protocol I, Articles 86 and 87.

<sup>1459</sup> CCU, Article 401.

This understanding is based on the following analysis:

- Articles 86 and 87 of Additional Protocol I (read together) set out the doctrine of command responsibility, according to which alleged perpetrators (i.e., commanders) can be prosecuted for a failure to act.<sup>1460</sup>
- Ukraine is legally bound to incorporate command responsibility into its domestic law. In particular:
  - Ukraine is a State Party to Additional Protocol I,<sup>1461</sup> and therefore undertakes “to respect and to ensure respect for this Protocol in all circumstances”.<sup>1462</sup> Ukraine thus has a duty to implement Articles 86 and 87 to ensure full respect for the Protocol.<sup>1463</sup>
  - Command responsibility finds legal basis in customary international law,<sup>1464</sup> which is binding on all States, including Ukraine.<sup>1465</sup> In addition, in relation to command responsibility, the ECtHR has confirmed that a criminal conviction based on command responsibility, through generalised domestic prohibitions on war crimes, has a sufficiently clear basis in international law by virtue of its customary international law status and thus does not contradict the legality principle.<sup>1466</sup>
  - Where there is a discrepancy between Ukraine’s domestic law and its international obligations pursuant to Additional Protocol I, it is required to interpret domestic law in line with its international law obligations.<sup>1467</sup>
    - The provisions of Additional Protocol I are considered part of the normative laws of Ukraine by virtue of Article 9 of the Ukrainian Constitution, which states that: “[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine”.<sup>1468</sup>
    - Article 3(5) of the CCU, which states that “[t]he laws of Ukraine on criminal liability shall be consistent with provisions of existing international treaties, ratified by the Verkhovna Rada of Ukraine”, further emphasises that domestic law must be interpreted in light of international law.

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<sup>1460</sup> Commentary on the Additional Protocols, Article 86, paras 3541-3542; *Delalić et al.* Trial Judgment, para. 340; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgment, 20 February 2001 (*Delalić et al.* Appeal Judgment), para. 237; ICRC, Customary IHL Database, Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes.

<sup>1461</sup> ICRC, ‘Treaties, States Parties and Commentaries: Ukraine’. Ukraine ratified Additional Protocol I on 15 January 1990.

<sup>1462</sup> Additional Protocol I, Article 1.

<sup>1463</sup> Commentary on the Additional Protocols, Article 1, para. 39. *See also*, Vienna Convention on the Law of Treaties (adopted on 23 May 1969 entry into force 27 January 1980) 1155 UNTS 331 (‘VCLT’), Article 26: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

<sup>1464</sup> *Delalić et al.* Trial Judgment, para. 343; ICRC, Customary IHL Database, Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes. *See also*, *Blaškić* Trial Judgment, para. 322; *Brdanin* Trial Judgment, para. 275; *Strugar* Trial Judgment, para. 357; *Akayesu* Trial Judgment, paras 612-613.

<sup>1465</sup> *See*, Dr J. Kellenberger, President of the International Committee of the Red Cross, ‘Foreword’ in *Customary IHL, Vol. I: Rules*, xv-xvii. The only exception to this rule is in the event that a State has openly and persistently objected to such a custom. *See*, Dr A.G. Koroma, Judge at the International Court of Justice, ‘Foreword’ in *Customary IHL, Vol. I: Rules*, xviii-xix. However, such an exception does not apply to Ukraine.

<sup>1466</sup> *Milanković v. Croatia*, Judgment, para. 57.

<sup>1467</sup> VCLT, Article 27.

<sup>1468</sup> Constitution of Ukraine (Information of the Verkhovna Rada of Ukraine (VVR), 1996, № 30, p. 141) 28 June 1996, Article 9.



- Article 438 of the CCU prohibits “Violation of rules of the warfare”, which includes “any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine”. This Article is contained in Section XX of the CCU on ‘Criminal Offences Against Peace, Security of Mankind and International Legal Order’, and therefore relates to substantive violations of the rules of warfare amounting to separate criminal offences. Article 438 refers to *any other violation* contained in international treaties binding on Ukraine and is not confined to definite lists of war crimes and therefore includes violations contained in Additional Protocol I. Since the failure to act of military commanders under Articles 86 and 87 can be interpreted as a separate offence, it can be incorporated into Article 438.
- The fact that command responsibility can be interpreted as a separate criminal offence is supported by:
  - A plain reading of Articles 86 and 87 of Additional Protocol I, which supports the interpretation that command responsibility can be a separate criminal offence.<sup>1469</sup> Article 86 establishes the individual criminal responsibility of commanders for the crimes committed by their subordinates where commanders fail to carry out their duty to act.<sup>1470</sup>
  - Case law of the ICTY, which recognised the possibility that command responsibility could be a separate offence;<sup>1471</sup>
  - Several national jurisdictions, which have also adopted this approach and have codified command responsibility as a separate offence within their legislation;<sup>1472</sup>
  - An analogous reading of Article 426 of the CCU, which criminalises ‘Omissions of Military Authorities’ as a separate criminal offence in relation to *Ukrainian military authorities*; and
  - The ECtHR’s confirmation that a criminal conviction based on command responsibility, through generalised domestic prohibitions on war crimes, has a sufficiently clear basis in international law by virtue of its customary international law status.<sup>1473</sup>

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<sup>1469</sup> See e.g., Meloni, ‘Command Responsibility’, p. 624; Robinson, ‘How Command Responsibility Got So Complicated’; M. Jackson, ‘Command Responsibility’ in de Hemptinne, Roth and van Sliedregt (eds), *Modes of Liability in International Criminal Law*, Cambridge University Press, 2019, paras 8, 10.

<sup>1470</sup> *Delalić et al. Trial Judgment*, para. 340. Further, according to ICRC’s Commentary on the Additional Protocols, under Article 86(2) of Additional Protocol I, a commander can face disciplinary or penal sanction for failing to act with respect to breaches which are not grave breaches, and can also be subject to universal jurisdiction (i.e., ‘*aut dedere aut judicare*’) when they fail to act in relation to their subordinates’ grave breaches: ICRC Commentary on Additional Protocol I, Article 86, para. 3542. Grave breaches are defined in: First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; Fourth Geneva Convention, Article 147; Additional Protocol I, Article 85.

<sup>1471</sup> *Delalić et al. Appeal Judgment*, para 237.

<sup>1472</sup> See e.g., Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, Sections 5, 7 (Canada); *Gesetz zur Einführung des Völkerstrafgesetzbuches* [Act to Introduce the Code of Crimes against International Law] (Germany) 26 June 2002, Bundesgesetzblatt Jahrgang II, 2002 Nr 42, 2254, Sections 13, 14; Serbian Criminal Code, 2019, Article 384; Republic of Lithuania Law on the Approval and Entry into Force of the Criminal Code, 26 September 2000 No VIII-1968, Article 113<sup>1</sup>.

<sup>1473</sup> *Milanković v. Croatia Judgment*, para. 57.



As such, based on the analysis above, failure to act by commanders is criminalised as a specific war crime under Article 438. The following section sets out the elements – as expanded upon by international practice – for command responsibility. In the alternative, many of the ways that commanders can be involved in the commission of international crimes – including their acquiescence to patterns of criminal activity implemented by their subordinates – can be subsumed under other modes of liability under the CCU, including ordering (*see* Section 3.4.5.4), organising (*see* Section 3.4.5.3.1.1), and aiding and abetting (*see* Section 3.4.5.3.1.2).

#### 3.4.5.5.2 Command Responsibility under ICL (Article 28(a), Rome Statute; Article 7(3), ICTY Statute; Article 6(3), ICTR Statute)

As mentioned above, command responsibility has been considered by the international courts and tribunals as a separate mode of liability. Nonetheless, the jurisprudence relating to this mode of liability is relevant for practitioners when addressing the scope of the ‘failure to act’ of military commanders.

Command responsibility refers to the responsibility of military commanders or civilian superiors for crimes committed by forces or subordinates acting under their command, authority and control, which occurred because of their failure to exercise proper control over those forces/subordinates.<sup>1474</sup>

To establish a commander’s responsibility for their failure to act, the following objective elements are required: (i) the accused was a military commander or civilian superior or person acting effectively as such; (ii) the accused had effective command and control or effective authority and control over the forces who committed the crime(s) in question;<sup>1475</sup> and (iii) the accused failed to take the necessary and reasonable measures within their power to prevent or repress the commission of such crimes, or failed to submit the matter to the competent authorities for investigation and prosecution.<sup>1476</sup>

The accused must have been a military commander or civilian superior, or a person acting as such. The ICTY confirmed that Articles 86 and 87 are broad enough to include civilian superiors in a position of authority.<sup>1477</sup> A civilian superior is one that exercises similar hierarchical authority over individuals as that required for command responsibility, but where a military or military-like structure cannot be established.<sup>1478</sup> The commander or superior does not need to be formally or

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<sup>1474</sup> Cryer et al. (2015), p. 368.

<sup>1475</sup> Noting that, in accordance with Article 28(b) of the Rome Statute, civilian superiors are only required to have “effective authority and control”.

<sup>1476</sup> Additional Protocol I, Article 87(1); Rome Statute, Article 28(a); *Blagojević & Jokić* Trial Judgment, para. 790; *Kordić and Čerkez* Appeal Judgment, para. 827; *Prosecutor v. Halilović*, IT-01-48-T, Trial Judgment, 16 November 2005 (*‘Halilović* Trial Judgment’), para. 56; *Limaj et al.* Trial Judgment, para. 520; *Orić* Trial Judgment, para. 294; *Bemba* Decision on the Confirmation of Charges, para. 407; *Ntaganda* Decision on Confirmation of Charges, para. 164.

<sup>1477</sup> *Delalić et al.* Appeal Judgment, paras 195 – 196; *Prlić et al* Decision to Dismiss the Preliminary Objections Against the Tribunal’s Jurisdiction, para. 19; *Orić* Trial Judgment, para. 308; *Prosecutor v. Aleksovski*, IT-95-14/1-T, Trial Judgment, 25 June 1999, para. 70. Accordingly, non-military members of governments, members of political parties or officials of corporations may incur liability under superior responsibility in relation to the criminal conduct of their subordinates: Triffterer & Ambos, *Commentary*, pp. 1101-1102.

<sup>1478</sup> Triffterer & Ambos, *Commentary*, p. 1101.

legally appointed, but their responsibility rests on whether they have effective command/authority and control over their subordinates.<sup>1479</sup>

The terms ‘effective command’ and ‘effective authority’ have similar meanings, as both refer to the power or right to prevent and punish offences.<sup>1480</sup> However, while ‘effective *command*’ refers to the existence of these rights because of an accused’s position within a chain of command, ‘effective *authority*’ encompasses different means and methods by which military commanders might have the right to exercise power or influence.<sup>1481</sup> ‘Effective *control*’ is common to both of these elements, and relates to the commander’s material ability to exercise this power or influence by preventing, repressing or punishing crimes committed by their subordinates, or to submit the matter to competent authorities for investigation or prosecution.<sup>1482</sup> Such control is generally a manifestation of a (formal or informal) superior-subordinate relationship between the accused and their forces.<sup>1483</sup>

The following is a non-exhaustive list of factors which may indicate that an alleged military commander possessed ‘effective control’:<sup>1484</sup>

- Their official position within the military structure and the actual tasks they carried out;
- Their power to issue orders, including their capacity to order forces or units under their command, whether under their immediate command or at lower levels, to engage in hostilities;
- Their capacity to ensure compliance with orders, including consideration of whether the orders were actually followed;
- Their capacity to re-subordinate units or make changes to the command structure;
- Their power to promote, replace, remove or discipline any member of their forces, and to initiate investigations;
- Their authority to send forces to locations where hostilities are taking place and withdraw them at any given moment;
- Their independent access to, and control over, the means to wage war, such as communications equipment and weapons;
- Their control over finances;
- Their capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group;

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<sup>1479</sup> *Bemba Trial Judgment*, para. 177; *Gacumbitsi Appeal Judgment*, para. 143; *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgment, 16 October 2007 (‘*Halilović Appeal Judgment*’), para. 59; *Delalić et al. Appeal Judgment*, para. 197; *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Trial Judgment, 15 March 2006 (‘*Hadžihasanović & Kubura Trial Judgment*’), para. 79.

<sup>1480</sup> *Popović et al. Appeal Judgment*, para. 1857; *Prosecutor v. Orić*, IT-03-68-T, Appeal Judgment, 3 July 2008, para. 159; *Delalić et al. Appeal Judgment*, para. 197; *Bemba Trial Judgment*, para. 180; *Bemba Decision on Confirmation of Charges*, para. 413.

<sup>1481</sup> *Bemba Decision on Confirmation of Charges*, paras 412-416.

<sup>1482</sup> *Bemba Trial Judgment*, para. 183; *Bemba Decision on Confirmation of Charges*, para. 415; *Delalić et al. Trial Judgment*, paras 190-198.

<sup>1483</sup> *Halilović Appeal Judgment*, para. 59.

<sup>1484</sup> *Bemba Trial Judgment*, para. 88. See also, *Halilović Trial Judgment*, para. 58; *Orić Trial Judgment*, para. 312; *Hadžihasanović & Kubura Trial Judgment*, para. 83; *Delalić et al. Appeal Judgment*, para. 206.

- Their representation of the ideology of the movement to which their subordinates adhere; and
- The fact that they have a certain level of profile, manifested through public appearance and statements.

The final objective element requires that the accused ‘failed to act’, i.e., failed to take the necessary<sup>1485</sup> and reasonable<sup>1486</sup> measures within their power to:<sup>1487</sup>

- **Prevent** the commission of the crimes before they were committed (including their planning and preparation<sup>1488</sup>) by, for example: (i) ensuring that the relevant forces operated in accordance with the relevant rules of law, including issuing orders specifically meant to prevent crimes;<sup>1489</sup> (ii) taking disciplinary measures to prevent the commission of atrocities, including by suspending, excluding or redeploying violent subordinates; (iii) protesting against criminal conduct and/or insisting before a superior authority that immediate action be taken; and (iv) postponing military operations and/or conducting those operations in such a way as to lower/remove the risk of specific crimes being committed;<sup>1490</sup>
- **Repress** (or subdue) the commission of crimes by, for example: (i) taking measures to prevent criminal acts that are in progress; (ii) conducting investigations regarding previous crimes; (iii) exercising disciplinary power; or (iv) proposing a sanction to a superior or remitting the case to a judicial authority where the accused has no such power to do so themselves;<sup>1491</sup> or
- **Punish** crimes by at least investigating possible crimes to establish the facts, and if the superior has no power to sanction, by submitting the matter to a functioning authority competent to investigate and prosecute the acts, for example, where commanders lack the disciplinary authority to adequately redress the crime in question.<sup>1492</sup>

The mental element of command responsibility requires that the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to

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<sup>1485</sup> **Necessary** measures in discharging these obligations are those that are appropriate and sufficient for the commander to genuinely discharge their duty to prevent, repress or punish. Generally, this will depend upon the type, severity and imminence of the crimes in question: *Bemba Trial Judgment*, para. 198; *Taylor Trial Judgment*, para. 501.

<sup>1486</sup> **Reasonable** measures are those that reasonably fall within the commander’s material power to prevent, repress or punish the impugned conduct. This will depend upon the extent of the commander’s material ability to prevent or repress the commission of crimes, or to submit the matter to competent authorities for investigation: *Karadžić Trial Judgment*, para. 588; *Bemba Decision on Confirmation of Charges*, para. 443; *Bemba Appeal Judgment*, para. 167.

<sup>1487</sup> Where a commander has a duty to prevent crimes but fails to do so, punishment after the fact will not remedy the breach of this obligation: *Orić Trial Judgment*, para. 326.

<sup>1488</sup> *Orić Trial Judgment*, para. 328.

<sup>1489</sup> See e.g., *Popović et al. Appeal Judgment*, para. 1898.

<sup>1490</sup> *Bemba Trial Judgment*, paras 202-204.

<sup>1491</sup> *Bemba Trial Judgment*, paras 205-207.

<sup>1492</sup> *Bemba Trial Judgment*, para. 208; *Halilović Trial Judgment*, para. 97; *Hadžihasanović & Kubura Trial Judgment*, para. 1061; *Hadžihasanović & Kubura Appeal Judgment*, para. 154; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment: Volume II, 10 June 2010, para. 2053.

commit such crimes.<sup>1493</sup> In other words, the accused either had actual knowledge of their forces' actions, or should have known about them.

The actual knowledge of the accused cannot be presumed and must instead be established by direct or circumstantial evidence.<sup>1494</sup> If the evidence is circumstantial, it must demonstrate an inference wherein the only reasonable conclusion is that the commander had actual knowledge or awareness regarding their subordinates' crimes.<sup>1495</sup> It should be noted, however, that, in any case, it does not have to be shown that the commander knew the specific identities of the direct perpetrator(s),<sup>1496</sup> nor that they mastered the precise details of the crimes to be committed.<sup>1497</sup>

Where the evidence does not show that the accused knew that the crimes were committed or about to be committed by their subordinates, practitioners should consider whether the evidence demonstrates that the accused *should have known* this to be the case.<sup>1498</sup> The factors considered when determining actual knowledge are also relevant to determining whether a commander "should have known" about the commission of crimes by their subordinates, or the risk of their occurrence.<sup>1499</sup> The accused will be taken to have knowledge of the crimes if they had general information to put them on notice of possible crimes committed by their subordinates or of the possible occurrence of crimes, and such information was sufficient to justify further inquiry or investigation.<sup>1500</sup>

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>Did the accused have an official or <i>de facto</i> position within a military chain of command?</li> <li>Was the group in which the accused had a rank State- or non-state in nature?</li> <li>What were the actual tasks that the accused carried out?</li> </ul>	<ul style="list-style-type: none"> <li>Official documents naming the accused as a high-level commander within the armed forces.</li> <li>Witness testimony of lower-level soldiers acknowledging the accused as their immediate commander or stating that their unit received orders from the accused.</li> <li>A series of electronic communications sent by the accused to a military unit ordering them to execute military operations.</li> <li>Statements by the accused acknowledging their role and position.</li> </ul>

<sup>1493</sup> Rome Statute, Article 28(a); *Bemba Decision on Confirmation of Charges*, para. 407; *Delalić et al. Trial Judgment*, para. 346; *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Judgment and Sentence, 17 May 2011 ('*Ndindiliyimana et al. Judgment and Sentence*'), para. 126.

<sup>1494</sup> *Bemba Trial Judgment*, para. 191; *Bemba Decision on Confirmation of Charges*, para. 430; *Blaškić Trial Judgment*, para. 307; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001 ('*Kordić and Čerkez Trial Judgment*'), para. 427; *Hadžihasanović & Kubura Trial Judgment*, para. 94; *Galić Appeal Judgment*, paras 171, 180-182.

<sup>1495</sup> See e.g., *Bemba Trial Judgment*, para. 192; *Vasiljević Appeal Judgment*, para. 120; *Delalić et al. Appeal Judgment*, para. 458; *Kordić and Čerkez Trial Judgment*, para. 427; *Blaškić Trial Judgment*, para. 307.

<sup>1496</sup> *Bemba Trial Judgment*, para. 194; *Ndindiliyimana et al. Judgment and Sentence*, p. 34 fn. 118; *Blagojević & Jokić Appeal Judgment*, para. 287.

<sup>1497</sup> *Bemba Trial Judgment*, para. 194; *Galić Appeal Judgment*, para 377.

<sup>1498</sup> *Bemba Trial Judgment*, para. 170; *Bemba Decision on Confirmation of Charges*, paras 407, 428. Note: The "should have known" standard of the ICC and "had reason to have known" standard of the *ad hoc* tribunals are not analogous, however, the ICC Pre-Trial Chamber in *Bemba* concluded that the indicia developed under the "had reason to have known" standard may be useful in applying the "should have known standard". See, *Bemba Decision on Confirmation of Charges*, para 434. For the "had reason to have known" standard, see e.g., *Delalić et al. Appeal Judgment*, para. 223; *Brđanin Trial Judgment*, para. 278; *Ndindiliyimana et al. Judgment and Sentence*, para. 126.

<sup>1499</sup> *Bemba Decision on Confirmation of Charges*, para. 434.

<sup>1500</sup> *Bemba Decision on Confirmation of Charges*, para. 434; *Delalić et al. Appeal Judgment*, para. 223; *Brđanin Trial Judgment*, para. 278.

<ul style="list-style-type: none"> <li>• Did the accused have the power to issue orders? Were they able to ensure compliance with their orders?</li> <li>• Did they have the capacity to re-subordinate units or make changes to internal structures, including by promoting, replacing, disciplining or investigating members of the forces?</li> <li>• Is there evidence that the accused was personally informed that their forces were involved in criminal activity?</li> <li>• What was the type, number, scope, location and timing of the illegal acts?</li> <li>• What was the means of available communication between the accused and their subordinates?</li> <li>• What was the location of the command at the time (i.e., was it geographically removed from the acts)?</li> <li>• What was the notoriety of the illegal acts (e.g., were they reported in media coverage of which the accused was aware)?</li> <li>• Is there evidence of a pattern of criminality?</li> <li>• What was the level of training of the accused's subordinates?</li> <li>• Were there any reports addressed to the accused, or press releases of international organisations and NGOs, regarding the crimes?</li> <li>• What was the extent of communication between the accused and their subordinates?</li> <li>• Based upon the resources and knowledge available to the accused, what action was reasonable at the time to prevent, repress or punish the crimes?</li> <li>• Did the accused fail to prevent, repress, or punish the crimes when they could have taken necessary and reasonable measures to do so?</li> <li>• Did the accused fail to submit the crimes to a competent tribunal when they could have taken</li> </ul>	<ul style="list-style-type: none"> <li>• CSO reports naming the accused as a high-ranking member of the military forces of a State.</li> <li>• Awards or decorations given by the accused to units/members of units under investigation.</li> <li>• An intercepted telephone conversation of the accused speaking with another commander explaining that he disciplined his unit when they didn't follow orders.</li> <li>• Minutes of a meeting in which the accused gave instructions to his subordinates.</li> <li>• Military expert reports explaining the chain of command within the military unit in question and describing the control the accused exercised.</li> <li>• Testimony of POWs who were soldiers within the accused's command structure describing how the command operated.</li> <li>• Official military documents detailing that the accused occupies a disciplinary position with respect to military units, and that they were trained to suppress criminal activity within those units.</li> <li>• An intercepted phone call where the accused mentions crimes that were committed by their forces.</li> <li>• Widely disseminated NGO or media reports describing how a military unit commanded by the accused was notorious for committing sexual violence against civilians during operations.</li> <li>• Videos of crimes committed by a military unit commanded by the accused which were widely shared on Telegram or social media.</li> <li>• A map of a town during the time the accused's military unit occupied it showing his headquarters in the centre of town where the vast majority of the campaign of violence against the town's civilians occurred.</li> <li>• Witness testimony of an exchanged POW that, when he was detained by the enemy, he saw soldiers bring the civilian goods they had stolen (e.g., jewellery, money, gadgets, etc.) to the detention centre and heard them brag about forcing local women into sexual acts with them, all in the presence of their commander (i.e., the accused).</li> <li>• A video of the accused at a detention centre that was widely known as a place where detainees were tortured.</li> <li>• Evidence that the area of responsibility of the unit the accused commanded was geographically remote, and they were the only unit in the area committing crimes.</li> <li>• Witness testimony of civilians who were "evacuated" from their town that they saw some of their fellow civilians get beaten and mistreated if they refused to evacuate by soldiers in the presence of the accused whom the witnesses were aware was the commander of the military unit implementing the evacuations.</li> <li>• Newspaper articles from the time that the accused was in command of the unit in a certain location describing in detail the crimes which were headline news.</li> </ul>
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<p>necessary and reasonable measures to do so?</p> <ul style="list-style-type: none"> <li>• Could the crimes have been prevented had the accused exercised their effective control correctly?</li> </ul>	<ul style="list-style-type: none"> <li>• A video of the UN Secretary General condemning acts of sexual violence routinely carried out by members of a paramilitary organisation led by the accused.</li> <li>• Witness testimony from other military commanders describing how it was common knowledge among all within the military (including the accused) that illegal methods of warfare were routinely employed.</li> <li>• Evidence of widespread criminality in the locality where the accused's subordinates were stationed.</li> <li>• Reports of criminal activities sent by field commanders to the accused which were never passed on to the competent investigative authority.</li> <li>• A photograph of the accused alongside the unit under their command during an operation in which crimes were committed.</li> <li>• A military manual describing how the accused, as a unit commander, has the authority and obligation to discipline members of their unit for committing violations during operations.</li> <li>• Testimony from the accused's subordinates describing how, under the chain of command, all members of the unit were duty bound to follow the accused's orders.</li> </ul>
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Table 78: Command Responsibility Cues and Examples of Evidence

### 3.4.5.6 Incitement to Genocide

Article 442(2) of the CCU prohibits public incitement to genocide as well as the production and distribution of any materials inciting genocide. Incitement to genocide gives rise to the principal liability of the perpetrator in the same way they would incur liability for the commission of the acts of genocide. Incitement would also require the same intent as required under Article 442(1), i.e., “for the purpose of total or partial destruction of any national, ethnic, racial or religious group”, since incitement to genocide is contained within the provision prohibiting genocide (i.e., Article 442).

#### **Article 442. Genocide**

2. Public incitement to genocide, and also production of any materials inciting to genocide for the purpose of distribution, or distribution of such materials shall be punishable by arrest for a term of up to six months, or imprisonment for a term of up to five years.

#### 3.4.5.6.1 *Incitement to Genocide under ICL (Article 25(3)(e), Rome Statute; Article 4(3)(c), ICTY Statute; Article 2(3)(c), ICTR Statute)*

Incitement to commit genocide is established by proving that the accused intentionally directly and publicly incited others to commit genocide.<sup>1501</sup> Direct and public incitement involves the act of directly provoking another person to commit genocide through one of the following mediums: speeches; shouting or threats uttered in public or at public gatherings; the sale, distribution or

<sup>1501</sup> *Akayesu* Trial Judgment, paras 554-557; *Nahimana et al.* Appeal Judgment, para. 677; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Judgment and Sentence, 24 June 2011 (*Nyiramasuhuko et al.* Judgment and Sentence), paras 5985-5987. See also, Rome Statute, Article 25(3)(e); ICTY Statute, Article 4(3)(c); ICTR Statute, Article 2(3)(c); Triffterer & Ambos, *Commentary*, pp. 1016-1017.



display of written or printed material in public or at public gatherings; placards or posters; or through any other means of audio-visual communication.<sup>1502</sup>

To determine whether the true meaning of a speech (or other medium) is to incite others to commit genocide, practitioners should examine how it was understood by the intended audience and evaluate, for example: the culture of the area in which the speech was made; the nuances of the language used in, and the tone of, the speech; and whether the speech was given in the context of an already genocidal environment.<sup>1503</sup>

The mental element of this mode requires that the accused *intended* to directly prompt or provoke another to commit genocide.<sup>1504</sup> This implies that the accused had a desire “to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging”.<sup>1505</sup> In other words, the person who is inciting others to commit genocide (i.e., the accused) must, themselves, have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.<sup>1506</sup>

Cues for Practitioners	Examples of Evidence
<ul style="list-style-type: none"> <li>Did the accused make a public call for the commission of genocide to a number of individuals?</li> <li>In what fora did the accused make this public call: <ul style="list-style-type: none"> <li>a speech?</li> <li>mass media, e.g., TV or radio?</li> <li>by shouting or uttering threats in public places or at public gatherings?</li> <li>through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings?</li> <li>through the public display of placards or posters?</li> <li>through any other means of audio-visual communication?</li> </ul> </li> <li>In this speech (or other form of mass communication) did the accused directly call for the commission of genocide? <ul style="list-style-type: none"> <li>If not, was the accused’s speech merely hate speech?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>A witness testifying that they saw the accused addressed a large group during which they urged those gathered to eliminate a certain national group.</li> <li>A publicised speech in which the accused, the leader of a State, repeatedly denied the existence of an opposing State, including by denying that that State has a unique culture, language and people. In addition, the accused indicated that all who argue otherwise are Nazis who deserve punishment and need to be eradicated.</li> <li>Media reports publishing statements made by the accused, a politician, accusing another State of committing atrocities against their people, particularly against people belonging to the same nationality as the accused. The accused emphasised that his State and its armed forces had a duty to act and take all means necessary to prevent further harm and encouraged the armed forces to “seek out and ensure every last enemy is gone from this land”.</li> <li>Video footage of the accused giving a public address blaming a religious group for the problems the accused’s religious group has suffered and calling for those present to do everything possible to address that issue.</li> <li>A newspaper op-ed written by the accused calling for the murder and extermination of a racial group.</li> <li>A UN report detailing instances during which the accused made public, inflammatory speeches in which they spoke ill</li> </ul>

<sup>1502</sup> *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Decision on Defence Motions for Acquittal Under Rule 98bis, 16 December 2004, para. 109; *Akayesu Trial Judgment*, para. 559.

<sup>1503</sup> *Nyiramasuhuko et al. Judgment and Sentence*, para. 5986; *Akayesu Trial Judgment*, para. 557; *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Trial Judgment, 3 December 2003, para. 1022.

<sup>1504</sup> *Akayesu Trial Judgment*, para. 560.

<sup>1505</sup> *Akayesu Trial Judgment*, para. 560.

<sup>1506</sup> *Akayesu Trial Judgment*, para. 560; *Nyiramasuhuko et al. Judgment and Sentence*, para. 5985.

<ul style="list-style-type: none"> <li>• Or, was the true meaning of the speech to incite genocide, given the specific language that was used and/or the audience to whom to speech was made?</li> <li>• Was the accused advocating for violence, hatred or resentment towards a particular group?</li> <li>• Did the accused intend to bring about the physical or biological destruction of at least a substantial part of the group?</li> <li>• Did the accused make any public statements, disseminate documents or articles, participate in radio or television broadcasts, etc. in which they indicated the existence of a genocidal plan or policy?</li> </ul>	<ul style="list-style-type: none"> <li>• of a particular ethnic group and blamed that group for their country's economic problems.</li> <li>• A witness testifying that the accused addressed a crowd and urged them to unite in order to eliminate "the enemy", implying that the enemy were members of a particular religious group.</li> <li>• Radio broadcasts, for which the accused was responsible, in which listeners were repeatedly and urgently called upon to take action against the "enemy" national group, paired with constant denigration of that group.</li> <li>• UN human rights reports detailing that the accused's remarks were made in the context of an environment that was indicative of genocide.</li> <li>• The publication, in a newspaper owned and edited by the accused, of articles advocating for the destruction of a certain national group.</li> <li>• A policy document, signed by the accused and published in the local paper, setting out a plan for the removal of a certain national group.</li> </ul>
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*Table 79: Incitement to Genocide Cues and Examples of Evidence*

### **3.5 ESTABLISHING A CASE THEORY AND ANALYSING THE INFORMATION COLLECTED**

With a view to outlining how practitioners should analyse and collate the available information in order to demonstrate that international crimes were actually committed, this section will address the following themes: (i) establishing the crime base (*see* Section 3.5.1); (ii) mapping the crime base (*see* Section 3.5.2); and (iii) establishing linkage (*see* Section 3.5.3).

#### **3.5.1 Establishing the Crime Base**

When documenting international crimes for the purpose of assisting an international criminal case, practitioners first need to analyse and collate the available information in order to demonstrate that international crimes were actually committed. The sheer amount of information collected during an international crime documentation process requires practitioners to map those incidents of most significant criminality to be highlighted and targeted as appropriate by using a clear and defensible methodology.

#### **3.5.2 Mapping the Crime-Base**

At the outset of the mapping process, practitioners should maintain a broad focus, ideally without focusing on one single incident or allegation (e.g., a massacre), as doing so may cause a premature narrowing of the scope of the documentation process, or lead practitioners to ignore valuable information or allegations that may be vital to an eventual prosecution or other potential cases.

In order to do so, it may be helpful to adopt a thematic approach. Having considered the publicly available evidence of violations committed in Ukraine, it is possible to define several thematic areas, and/or elements of offending, which, given the gravity and/or scale of offences, could be justifiably

prioritised in an initial mapping process. These may include, for example: (i) attacks against civilians; (ii) rape and other acts of sexual violence; (iii) torture and inhumane treatment; (iv) starvation; and (v) enforced disappearances.

Through this mapping exercise, practitioners can develop an approximate pattern of the commission of offences and begin to gauge their frequency and gravity. This initial mapping process will lay the foundation for practitioners to collate ‘crime base’ information relating to the circumstances and facts that pertain directly to the commission of the crimes,<sup>1507</sup> including the individual events (i.e., the specific offences that occurred and their surrounding circumstances), and the actors participating or present at or near the scene of those crimes.<sup>1508</sup> With analysis, this information may prove to be crucial in identifying and successfully prosecuting specific perpetrators.<sup>1509</sup>

The elements that need to be satisfied to establish the crime base are considered in Section 3.2.

### 3.5.3 Establishing Linkage

Second, practitioners need to establish ‘linkage evidence’, which is the term used to describe the evidence that helps connect alleged perpetrators to the violations in question.<sup>1510</sup> Collecting linkage evidence for international crimes generally requires a ‘bottom-up’ approach whereby each ‘link’ in the chain of responsibility is mapped from the direct perpetrator of the crime upwards to include those who, despite being physically or organisationally removed from its physical commission, nonetheless contributed to the crime through chains of command and layers of decision-making.<sup>1511</sup> This may include, for example, senior politicians, military or security personnel, many of whom are often considered to be ‘most responsible’<sup>1512</sup> for international crimes given their overarching responsibility in commissioning or otherwise facilitating their commission.

Linking these individuals to international crimes will usually require evidence that demonstrates the existence of hierarchies that identify those wielding effective control within those hierarchies. Understanding how to draw such links is helpful when confronted with complex command structures (military, superior (i.e., civilian) or both). This is particularly so because, in the prosecution of senior leadership cases, the defence may not challenge the existence of the ‘basic’

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<sup>1507</sup> M. Nystedt (ed), C.A. Nielsen and J.K. Kleffner, ‘A Handbook on Assisting International Criminal Investigations’ (Folke Bernadotte Academy and Swedish National Defence College 2011) (‘Nystedt et al., Handbook’), p. 42.

<sup>1508</sup> Nystedt et al., Handbook, p. 42.

<sup>1509</sup> Patterns of crime can assist in establishing linkage evidence given the common themes within the ‘pattern’. Further, the pattern does not necessarily need to be something overly complex, it can be something so simple as a particular uniform denoting a specific group of the military were responsible for crimes. See, S.F. Ribeiro & D. van der Straten Ponthoz, ‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law’ (2<sup>nd</sup> ed, UK Foreign & Commonwealth Office 2017) (‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict’), p. 226.

<sup>1510</sup> OHCHR, ‘Who’s responsible? Attributing Individual Responsibility For Violations of International Human Rights and Humanitarian Law in United Nations Commissions Of Inquiry, Fact-Finding Missions And Other Investigations’ (2018) (‘OHCHR, Who’s Responsible?’) p. 17.

<sup>1511</sup> OHCHR, Who’s Responsible?, p. 40.

<sup>1512</sup> International Criminal Court (‘ICC’), Office of the Prosecutor (‘OTP’), ‘Strategic Plan (2016-2018)’ (16 November 2015) (‘ICC OTP Strategic Plan 2016-2018’), paras 35-36.

crime base, but, rather, will decide to focus on (rebutting the evidence of) chains of responsibility between crimes and the accused.<sup>1513</sup>

Given their organisational and physical remoteness from the crimes in question, linkage evidence demonstrating the criminal responsibility of those at the higher echelons of the power structure might not be immediately available. That said, it is entirely likely that such evidence will present itself once the crime base is identified and analysed and others (such as accomplices and co-perpetrators) at the lower levels of the command structure begin to be targeted for investigation or are dealt with by the courts.<sup>1514</sup> Of course, the documentation process cannot always be so linear: a combination of a ‘top-down’ and ‘bottom-up’ approach may be necessary.<sup>1515</sup>

### 3.5.3.1 Perpetrator Levels

The number of levels linking a suspect to the crime will depend on how far the suspect is removed from the physical perpetration of the crime and the complexity of the structures and institutions employed by a perpetrator.<sup>1516</sup>

Establishing a link between those ‘most responsible’ and the crimes committed will usually involve, at a minimum, the following levels:

- (i) the identification of **direct perpetrators** and the organisations of which they are members;
- (ii) documentation of the organisational structures and **mid-level perpetrators**; and
- (iii) documentation of **high-level perpetrators**.

#### 3.5.3.1.1 *First level: Direct Perpetrators and the Organisations of which they are Members*

The ‘first’ linkage level involves the establishment of the identity and specific conduct of the direct perpetrators, meaning those who have physically committed the crime (e.g., in terms of murder by shooting, the individual(s) who pulled the trigger).<sup>1517</sup>

Witness testimony is likely to be the primary source of crime base evidence as it can establish what happened, when and where the crime occurred, who was involved and its impact. Even if witnesses and victims cannot positively identify the perpetrators, the information gathered may provide significant leads that can assist the documentation process,<sup>1518</sup> including information identifying the perpetrators as belonging to a particular group, such as clothing, vehicles, dialect or weaponry.<sup>1519</sup>

Physical information is also commonly linked to this ‘first’ level of perpetrators. It includes the type of information one would find at the scene of a crime, for example, a murder weapon, bullet casings,

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<sup>1513</sup> International Criminal Tribunal for the former Yugoslavia (‘ICTY’), ‘ICTY Manual on Developed Practices’ (International Criminal Tribunal for the former Yugoslavia (UNICRI Publisher 2009) (‘ICTY Manual on Developed Practices’), p. 122.

<sup>1514</sup> See e.g., ICC OTP Strategic Plan 2016-2018, para. 35.

<sup>1515</sup> ICTY Manual on Developed Practices, p. 15.

<sup>1516</sup> Institute for International Criminal Investigations (‘IICI’), ‘Investigators Manual’ (2014) (‘IICI Investigators Manual’), p. 96.

<sup>1517</sup> IICI Investigators Manual, p. 105

<sup>1518</sup> IICI Investigators Manual, p. 105.

<sup>1519</sup> IICI Investigators Manual, p. 105.

bloodstains or fingerprints. It may be equally helpful to establish the victims of a crime, such as those exhumed from a mass grave.<sup>1520</sup>

Video or photographic information, if authenticated (*see* Section 5.5.3), can also be highly probative and reliable information about how the crime occurred. It may, for example, include images of injuries or damage suffered as a result of a violation.<sup>1521</sup> In the context of an international crimes case, this may provide key information about the identity of the direct perpetrators, who may have been caught on camera by witnesses or may have even filmed themselves committing crimes.<sup>1522</sup>

Regardless of the seniority of the final target of the documentation process, establishing this ‘first’ level of perpetrators is essential: without such information it will be difficult to establish any link between the crimes and those at the leadership level who controlled or facilitated the criminal acts. After drawing such a link, practitioners can look to establish the organisations to which these perpetrators belonged or were working with to commit the specific crime being documented.<sup>1523</sup> It will naturally enable practitioners to propose or conclude who at the higher level of command or influence might be responsible for the direct perpetrator’s actions.

#### 3.5.3.1.2 *Second Level: Organisational Structures and Mid-level Perpetrators*

The ‘second’ linkage level seeks a clear understanding of the organisation and hierarchical structure of the group identified as being involved in the perpetration of the crime,<sup>1524</sup> and the identification of any mid-level perpetrators responsible for its commission. This can involve mapping:

- (i) The structures within the organisation;
- (ii) The people with authority and the scope of their authority;<sup>1525</sup>
- (iii) How such persons communicated with each other (especially how orders and directions are passed and complied with and reports issued); and
- (iv) What laws and regulations define the relationships between persons, and the *de facto* channels of authority.<sup>1526</sup>

In reality, the number of layers that need to be investigated at this stage “will vary on a case-by-case basis, depending on a variety of factors including the institutional structure of the organisation itself, the crimes it was deployed to commit, and the means by which the crimes were committed”.<sup>1527</sup>

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<sup>1520</sup> *Prosecutor v. Krstić*, ICTY-IT-98-33-T, Trial Judgment, 2 August 2001, para. 71.

<sup>1521</sup> *Prosecutor v. Karadžić*, ICTY-IT-95-5/18-T, Trial Judgment, 24 March 2016, p. 236.

<sup>1522</sup> *Prosecutor v. Ladjedvardi*, 5-3StE 2/16-4-1/16, Judgment, 12 July 2016. In the *Al-Mahdi* case before the ICC, for example, the accused was recorded in several videos and photographs explaining how the attack should unfold, offering prayer dedicated to the attack and also as being present at the sites of attack: *see, Prosecutor v. Al-Mahdi*, ICC-01/12-01/15, Judgment and Sentence, 27 September 2016, paras 35, 37 and 38.

<sup>1523</sup> M. Bergsmo and W.H. Wiley, ‘Chapter 10: Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes’ in S. Skåre, I. Burkey and H. Mørk (eds), *Manual on Human Rights Monitoring: An Introduction for Human Rights Officers* (University of Oslo, Norwegian Centre for Human Rights 2008), p. 8.

<sup>1524</sup> IICI Investigators Manual, p. 108.

<sup>1525</sup> IICI Investigators Manual, p. 108.

<sup>1526</sup> IICI Investigators Manual, p. 108.

<sup>1527</sup> IICI Investigators Manual, p. 107.

That said, regardless of the number of layers investigated at this stage, the process of doing so will usually reveal a number of mid-level perpetrators, which includes those persons superior to the direct perpetrators of the crime who are answerable to the highest levels in the organisations. Such persons may become the subject of the investigation themselves or may lead the investigation upwards towards the high-level perpetrators.

#### 3.5.3.1.3 *Third Level: High-level Perpetrators*

The final, 'third' linkage level relates to high-level perpetrators such as senior politicians, military or police officials, or commanders of non-state groups<sup>1528</sup> who organise, rather than participate in, the direct perpetration of a crime.<sup>1529</sup>

The documentation of potential high-level perpetrators is often complex and requires a comprehensive understanding of the (legal and factual) links and relationships between the investigated senior official and the intermediary units and direct perpetrators operating under their authority.<sup>1530</sup> Success at this level may be difficult to achieve, as the further the documentation process goes, especially through the higher echelons of power and responsibility, the less likely it is to find information linking senior officials to the crimes alleged.

That said, there is a range of information that may be helpful in this regard. In developing an understanding of legal and factual authority of a senior official in question, practitioners may review a range of documentary information and, if available, employ the skills of specialised military or political analysts. Similarly, insider witnesses and accomplices will likely provide *essential* information relating to factual chains of authority that circumvent legal relationships.<sup>1531</sup> However, practitioners should be cognisant of the significant challenges and risks associated with obtaining reliable linkage information from insider witnesses and accomplices. In particular, they may:

- (i) Be implicated in crimes and be another person of interest to the investigation;
- (ii) Show hostility towards the documentation process;<sup>1532</sup>
- (iii) Blame others to shield themselves or someone else from documentation;
- (iv) See it as an opportunity to further their own agenda; or, equally,
- (v) Be at risk of intimidation or reprisals for providing such information.<sup>1533</sup>

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<sup>1528</sup> OSCE Investigation Manual For War Crimes, Crimes Against Humanity And Genocide In Bosnia And Herzegovina, p. 31.

<sup>1529</sup> Nystedt et al., Handbook, p. 43.

<sup>1530</sup> IICI Investigators Manual, p.109.

<sup>1531</sup> IICI Investigators Manual, p.109.

<sup>1532</sup> OHCHR, 'Manual on Human Rights Monitoring' (2011) UN Doc HR/P/PT/7/Rev1, p. 25.

<sup>1533</sup> ICTY Manual on Developed Practices, p. 20: care should be taken to ensure the safety and security of insider witnesses for this reason.



## **PART THREE: DOCUMENTING INTERNATIONAL CRIMINAL CASES**

Part Three provides guidance on how to prepare for, and conduct, the documentation of international crimes. It focuses on how to collect information in a safe and secure manner, to ensure its admissibility in domestic or international trials. In particular:

- **Section Four** provides guidance on the essential preparatory steps practitioners must carry out before commencing documentation activities to ensure any information collected is properly handled and securely stored, in line with international best practice.
- **Section Five** concerns the collection and preservation of information. It begins by introducing information/evidence and providing an overview of the applicable admissibility requirements. Second, the section outlines the specific steps practitioners must follow in relation to receiving, recording, handling, preserving and authenticating the different categories of information, including physical, documentary, digital and open-source intelligence ('OSINT').
- **Section Six** highlights the best practices for dealing with victims and witnesses of international crimes, including best practices when interviewing particularly vulnerable witnesses.
- **Section Seven** examines best practices for documenting conflict-related sexual violence ('CRSV').

### **4 PREPARING FOR DOCUMENTATION**

The documentation of international crimes can differ greatly from the documentation of domestic crimes. Preparation is essential. This section sets out the key steps that practitioners must undertake prior to commencing documentation activities.

With a view to assisting practitioners in preparing for an investigation, this section will address the following themes:

- **4.1 Preparing the Documentation Kit and Folder:** understanding how to prepare a Documentation Kit and Documentation Folder.
- **4.2 Implementing a Storage System:** understanding how to store information and how to maintain a chain of custody.
- **4.3 A Documentation Plan:** understanding how to create a Documentation Plan, which should include: (i) preliminary research and identification of allegations and objectives; (ii) potential alleged offence(s) and the elements to be proven; (iii) potential subjects to be explored; (iv) who will comprise the team as well as a plan for the documentation activities and information collection; (v) tasks to be completed, and the resources and costs required; and (vi) review.

- **4.4 Preparing a Risk Assessment and Strategy:** understanding how to assess risks to potential victims/witnesses,<sup>1534</sup> the practitioner and the documentation process.

## **4.1 PREPARING THE DOCUMENTATION KIT AND FOLDER**

### **4.1.1 The Documentation Kit**

Prior to any documentation activity, a **Documentation Kit** should be prepared.

**The Documentation Kit should include**, depending on the scope of your documentation:<sup>1535</sup>

1. Communications equipment, mobile telephone, satellite telephone, radio (or similar);
2. Laptop computer;
3. Digital audio recording device that can be used to record interviews, oral notes of documentation activities or observations at a crime site;
4. Digital storage media (thumb drives, memory sticks, etc.);
5. Global Positioning System ('GPS') navigators (and maps);
6. Camera (an **Information Photo Board** is a handy tool for photographic information: a small chalkboard or a blank piece of paper on which to write key information that will help identify the photo at a later time); and
7. Other items that might be useful, such as: measuring tape; notepad; ropes and signs to secure the scene of an incident; computer tool kit for extraction of hard drives and devices; evidence bags in a range of sizes; evidence tape; evidence boxes; rubber gloves; cotton swabs; plastic bags; torch; first aid kit; etc.

### **4.1.2 Preparing a Documentation Folder**

Practitioners should use a **Documentation Folder** to catalogue the information collected during documentation activities.<sup>1536</sup> A Documentation Folder can be created either electronically or in hardcopy, but **must include every record of your documentation activities and copies of the information collected.**<sup>1537</sup>

For **small-scale documentation activities** that involve single-event crimes or that have limited information, a simple folder recording the following information may suffice:<sup>1538</sup>

1. The identity and details of the alleged perpetrator(s) and any victims or witnesses. Witness information should be kept in a separate file, to ensure its confidentiality and security;
2. The location, date, time, circumstances and nature of the incident;
3. The responses of the government and/or of other groups; and

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<sup>1534</sup> These risks are also discussed in detail in Section 6.1.

<sup>1535</sup> D. Groome, *Handbook of Human Rights Investigation* (2<sup>nd</sup> edn, Human Rights Press 2011) ('Groome Handbook'), p. 55.

<sup>1536</sup> Groome Handbook, p. 64.

<sup>1537</sup> Groome Handbook, p. 66.

<sup>1538</sup> F. D'Alessandra, et al., Public International Law & Policy Group ('PILPG'), 'Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practice' (2016) ('PILPG Handbook'), pp. 121-122.

4. Any other available, relevant, materials, e.g., police records, medical or forensic reports, witness statements, etc.

For **larger-scale documentation activities** that involve large quantities of information and/or multiple criminal allegations, a more extensive folder or database (preferably electronic, but also in hardcopy if necessary) should be created, with the following:

1. **Case Management File:** containing an 'Activity Log' describing all the activities undertaken, and who they were taken by.<sup>1539</sup>
2. **Communications File:** containing a 'Communications Log' recording any relevant communication (including written correspondence) related to the progress of the documentation process and including details like the date, time, duration, participants in, and content of the communication.<sup>1540</sup>
3. **Witness Statement File:** containing copies of witness statements or summaries (it is preferable that the original signed statements are separately filed in a secure location) and a 'Witness Communications Log' (a chronological record of all the contact that the practitioner has had with each witness, including the date, time and place of the interview, interview notes, and the names of the people present). Any information that may identify the victim or witness should not be included in this file and the witness should be referred to by a code number.<sup>1541</sup>
4. **Confidential Witness Information File:** containing sensitive information about the witness that should be kept **separate** from the main Witness Statement File. This file should include a 'Witness Code Sheet' identifying each witness and their code number and a 'Witness Information Sheet' recording sufficient information about the witness to ensure that they can be located.<sup>1542</sup>
5. **Information File:** containing a record of all the physical, photographic/video and documentary information collected, separated into different logs for each type of information (e.g., a 'Physical Information Log'), with a separate entry for each piece of information. Each entry should contain, at a minimum, the date the information was collected, the name of the person who collected the information and a description of the item.<sup>1543</sup> Maintain copies of all photographs/videos and documents, either in a separate physical storage location or in digital form, on an external hard drive or by uploading duplicates to a secure location.<sup>1544</sup> (*See also* Sections 5.3 to 5.5.)
6. **Sketch and Diagram File:** containing the sketches or diagrams created during the documentation process and a 'Sketch and Diagram Log' detailing the date each sketch or diagram was created, the name of the creator and a description of what the sketch/diagram

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<sup>1539</sup> Groome Handbook, pp. 72, 73.

<sup>1540</sup> Groome Handbook, pp. 65, 66.

<sup>1541</sup> Groome Handbook, pp. 64, 67, 68.

<sup>1542</sup> Groome Handbook, pp. 66, 69.

<sup>1543</sup> Groome Handbook, p. 70.

<sup>1544</sup> Groome Handbook, pp. 70-71.

depicts. It is prudent to make duplicates of all sketches, charts and diagrams, to be stored separately.<sup>1545</sup>

Information in the Documentation Folder must be carefully catalogued and clearly numbered. It should not form a collection of materials compiled in a random order. This should be done by dividing large Documentation Folders into volumes (up to around 250 pages each) and placing the materials in the Folders in **chronological order** in relation to a particular geographical location or case. This approach should be followed **consistently** throughout all documentation activities.

#### **4.1.2.1 Recording Documentation Details in Documentation Notebooks**

It is advisable that practitioners use **two notebooks** (or, where more practical, one notebook clearly divided) to record the details of the documentation process.

**Notebook 1:** To record all **objective** information discovered during the documentation process as well as the practitioner's actions. For each activity taken, include a short description of where you were, who was there, what you observed and when, and what information was unearthed. Try to record matters contemporaneously to ensure the accuracy of the record.<sup>1546</sup>

**Notebook 2:** To record any **subjective** analysis, personal reflections or other similar commentary.<sup>1547</sup>

## **4.2 IMPLEMENTING A STORAGE SYSTEM**

Prior to any documentation activities, practitioners must consider where and how any information collected is going to be stored and organised. If information is not stored according to best practice, the information may not be relied upon in a court process later.

If practitioners cannot ensure the confidentiality and/or integrity of information, they must **not** collect it **to avoid the information being lost, damaged or rendered unusable**.

### **4.2.1 How to Store Information**

Practitioners should utilise a combination of manual/physical and digital storage systems.<sup>1548</sup> A manual/physical storage system is needed to store/inventory physical information. Everything in the physical archive should be digitalised to render it searchable, disclosable and protected.<sup>1549</sup> The digital archive will include any items which originates in digital form.<sup>1550</sup> Practitioners should

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<sup>1545</sup> Groome Handbook, p. 71.

<sup>1546</sup> M. Nystedt (ed), C.A. Nielsen and J.K. Kleffner, 'A Handbook on Assisting International Criminal Investigations' (Folke Bernadotte Academy and Swedish National Defence College 2011) ('Nystedt et al., Handbook'), p. 50.

<sup>1547</sup> Nystedt et al. Handbook, p. 50; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Admissibility of Four Documents, 13 June 2008 ('Lubanga Decision on the Admissibility of Four Documents'), paras 36-42.

<sup>1548</sup> See e.g., PILPG Handbook, pp. 123-127; S.F. Ribeiro and D. van der Straten Ponthoz, 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law' (2<sup>nd</sup> edn, UK Foreign & Commonwealth Office 2017) ('International Protocol on the Documentation and Investigation of Sexual Violence in Conflict'), p. 203.

<sup>1549</sup> See e.g., 'Investigation Manual for War Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina' (Organization for Security and Co-operation in Europe ('OSCE') 2013) ('OSCE Investigation Manual For War Crimes, Crimes Against Humanity And Genocide In Bosnia And Herzegovina'), p. 233.

<sup>1550</sup> See e.g., International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 206.

conduct a risk assessment of all storage options available, and assess which systems are best suited based on physical space and security measures available as well as capacity and resources (see Section 4.4).<sup>1551</sup>

#### **Basic Principles when Handling and Storing Information**

Whether a digital or manual system is used, in addition to the specific rules examined in Sections 5.3 and 5.4, practitioners should follow these **basic principles**:<sup>1552</sup>

1. Ensure that materials are stored in a safe and secure manner (in both manual and digital form) in a logical order (i.e., chronological) and easily-retrievable.
2. Implement a policy outlining who will have control over, and access to, the information. Ensure that only responsible personnel have access to the information and put in place a security plan (see Section 4.4.2.1) to ensure the safety of these individuals.
3. All items should be catalogued with an established numbering system. Where relevant, the number of an item should include a link/reference to the connected piece of evidence. For example, documents referred to in a witness statement should be clearly marked as such.
4. Store public information separately from confidential information (including information that identifies a victim/witness and their statement).
5. Ensure that the confidentiality requirements applicable to the information in the Documentation Folder are followed and that the information is not disclosed, e.g., in breach of professional privilege.
6. Keep a backup of the information collected in a second, secure location.
7. Have emergency evacuation plans in place for securing the materials if needed.
8. Access the information in a secure environment and avoid travelling with confidential documents or files. If necessary, use encrypted USB sticks.

Organisations like the **Human Rights Information and Documentation Systems** ('HURIDOCs') provide further guidance and useful resources.<sup>1553</sup>

If a **manual storage system** is used, these additional basic principles must be followed:<sup>1554</sup>

1. Keep a logbook to record any access to the storage facility. The logbook should contain details like the name of the person, the date, time and purpose of access, and what items were accessed; and
2. If the information is perishable (e.g., old notebooks), ensure that the storage conditions are appropriate. In particular, keep the evidence away from heat, light, damp and humidity as well as insects, mice or other animals that may damage it. (See also Sections 5.3 and 5.4.)

If a **digital storage system** is used, these additional basic principles must be followed:<sup>1555</sup>

1. Assess which technologies are the most appropriate for your purpose (**Security in-a-Box – Digital Security Tools and Tactics** provides guidance on available technologies);<sup>1556</sup>

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<sup>1551</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 203.

<sup>1552</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 203-204.

<sup>1553</sup> HURIDOCs can be contacted at: 11 Rue du Cornavin, CH-1201 Geneva, Switzerland (+41 227555252, [info@huridocs.org](mailto:info@huridocs.org)).

<sup>1554</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 205.

<sup>1555</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 206.

<sup>1556</sup> Security in-a-Box provides services such as: protecting your device from malware and phishing attacks; protecting information from physical threats; creating and maintaining strong passwords; protecting sensitive files on your computer; recovering lost information; destroying sensitive information; keeping your digital communication private; remaining

2. Put in place a digital security protocol before collecting and storing information electronically. Open sources like [Security in-a-Box Guide to Digital Security](#) provide guidance but, ideally, specialists should also be consulted;
3. Protect and encrypt all sensitive electronic files using anti-virus software and passwords, and store passwords securely in a separate location. Encryption tools are often freely available on the Internet. Some examples are: [AxCrypt](#), [BitLocker](#), [GNU Privacy Guard](#) and [7-Zip](#); and
4. Automatically record any access to the digital files and have an edit-trail function on the files to track any modifications made. Back up digital files frequently so that all changes are securely saved. (*See also* Section 5.5.)

#### 4.2.2 How to Maintain a Chain of Custody

The chain of custody of evidence is an important indicator of authenticity (i.e., ‘provenance’ and ‘authorship’), therefore reliability, when determining the admissibility of evidence (*see* Section 5.2). From the moment of collection to the time the information is used in court as evidence,<sup>1557</sup> there should be proof of secure, continuous possession from each custodian of the information in question.<sup>1558</sup>

Thus, **practitioners should have established procedures in place to track who maintained custody over all information collected.** The chain of custody should not be broken, the information should be secured and all movements must be recorded.<sup>1559</sup> As a general rule, the number of people who handle or otherwise access the information should be limited as far as possible.<sup>1560</sup>

As mentioned above, a record of the information collection procedure should be created and stored in the Documentation Folder (*see* Section 4.1.2). In addition, it is recommended that practitioners undertake the following steps:

- Ensure evidence is **packaged and marked**. This guarantees that: (i) the items are protected from damage, substitution or alteration; and (ii) essential information on the contents of the package, its origin, initial condition, etc., is included on the marking. For more information, *see* Section 5.3.
- Record all movements of the information in the **logbook**.

### 4.3 CREATING A DOCUMENTATION PLAN

Practitioners should create a plan for *every* activity related to the documentation of international crimes (i.e., a ‘Documentation Plan’). The Documentation Plan should be used as an *overall guide* for

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anonymous and bypassing censorship on the internet; protecting data from social networking sites; and using your smartphone as securely as possible.

<sup>1557</sup> International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), ‘ICTY Manual on Developed Practices’ (2009) (‘ICTY Manual on Developed Practices’), p. 28.

<sup>1558</sup> M.H. Graham, *Federal Rules of Evidence in a Nutshell* (3rd edn, West Academic Publishing 1992), p. 402; ICTY Manual on Developed Practices, p. 28.

<sup>1559</sup> ICTY Manual on Developed Practices, p. 28.

<sup>1560</sup> Nystedt et al. Handbook, p. 57.



the documentation process.<sup>1561</sup> A good Documentation Plan should be realistic and flexible; its scope, intended outcomes and methodology should be based on the team's capacity; and it should be amended as new information comes to light.<sup>1562</sup>

**The Documentation Plan should contain the following:**<sup>1563</sup> (i) preliminary research and identification of allegations and objectives; (ii) potential alleged offence(s) and the elements to be proven; (iii) potential subjects to be explored; (iv) who will comprise the team as well as a plan for the documentation activities and information collection; (v) tasks to be completed, and the resources and costs required; and (vi) review. Each are discussed, in turn, below.

#### **4.3.1 Preliminary Research and Identification of Allegations and Objectives**

Prior to drafting the **Documentation Plan**, the team should undertake preliminary research on the following issues:<sup>1564</sup>

- The local context in which the alleged crimes have been committed;
- Which crimes have allegedly been committed;
- The local political and military structures (e.g., the Donetsk or Luhansk People's Republics);
- The alleged perpetrators (including the political, military or security organisations from which they emanate);
- The legal and social services available in the area for victims/witnesses;
- Whether the available information may have already been documented by other actors (such as Ukrainian prosecutors, activists or other CSOs); and
- Whether further documentation is necessary.

This can be achieved using, among other methods, open-source information (*see* Section 5.6), including websites, media outlets and reports from international organisations or other CSOs.

#### **4.3.2 Potential Alleged Offence(s) and Elements that Must be Proven**

Before initiating documentation activities, practitioners should form a preliminary view of the alleged violations.

Ideally, practitioners should carry out the documentation of international crimes in a two-step manner:

1. Consider the information indicating that the alleged offences have been committed (*see* Section 3.2); and

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<sup>1561</sup> OSCE Investigation Manual For War Crimes, Crimes Against Humanity And Genocide In Bosnia And Herzegovina, p. 184.

<sup>1562</sup> *See e.g.*, Institute for International Criminal Investigations ('IICI'), 'Investigators Manual' (2014) ('IICI Investigators Manual'), pp. 194-198.

<sup>1563</sup> IICI Investigators Manual, p. 193; OSCE Investigation Manual For War Crimes, Crimes Against Humanity And Genocide In Bosnia And Herzegovina, pp. 184-185.

<sup>1564</sup> *See e.g.*, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 123-124.

2. Assess the links between the alleged crimes and the (chain of) people allegedly responsible for committing them (*see* Section 3.4).

### 4.3.3 Potential Subjects to be Documented

Documentation activities should not be biased and should focus on all sides of the conflict. While practitioners must refrain from premature attempts to identify suspects, it will be useful to understand which groups have allegedly committed crimes in a given locality. To this end, practitioners should consider reports of formations operating in the areas where crimes have been committed.

### 4.3.4 Documentation Team, Plan of Documentation Activities and Information Collection

In light of the potential offences identified, the Documentation Plan should elaborate on what sorts of information can be collected, where it is likely to be located and how to obtain it.<sup>1565</sup> One person should be assigned the role of team lead who will provide regular instructions to the team and ensure that the documentation activities are thoroughly planned, and that the instructions are realistic, effective, not overly formalistic, and provide for measures which can advance the documentation process.<sup>1566</sup>

In broad terms, the plan should include:

- Steps that practitioners might take to generate further leads and ensure a sufficiently broad information-gathering exercise;
- Locations where the necessary information can be found (including where the crime may have taken place and where the victim(s) and/or perpetrator(s) were immediately before, during or after the incident);<sup>1567</sup>
- Any prioritisations of crime scenes to visit;<sup>1568</sup>
- Steps that need to be taken to retrieve, find and preserve information at each crime scene (*see* Sections 5.3 and 5.4);<sup>1569</sup> and
- Potential witness(es) who might provide relevant and probative leads or information about the incident (*see* Section 5.2).

The planning of activities should also involve **actor mapping** of the other investigators in the field, as well as the available referral pathways that are available for victims and witnesses, including medical, psycho-social and legal support (*see* Section 6), and other potential interlocutors or sources of information, including other CSOs, UN agencies, journalists, health workers, etc.

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<sup>1565</sup> IICI Investigators Manual, p. 196.

<sup>1566</sup> *See*, reports on the problems faced in this regard in Bielousov, Prosecutor. Manages? Coordinates? Supervises? Investigates, pp. 13, 107-110.

<sup>1567</sup> Groome Handbook, p. 83.

<sup>1568</sup> Groome Handbook, p. 83.

<sup>1569</sup> Groome Handbook, p. 80.

### 4.3.5 Tasks to be Completed and Resources and Costs

Practitioners must consider administrative details, such as: the amount of staff required to conduct the documentation activities (including interpreters, investigators and technical experts, such as child protection specialists);<sup>1570</sup> the location of the offices; the storage systems needed; and any other additional resources required.<sup>1571</sup> This may include, equipment, security, travel arrangements, accommodation, etc.

The Documentation Plan should include details of the roles and responsibilities of each staff member involved to avoid duplication of activities or disputes.<sup>1572</sup>

Expert advice should be sought from international experts (i.e., the Mobile Justice Teams ('MJTs')). Making use of this assistance, practitioners should ensure all members of the team:<sup>1573</sup> are appropriately selected and vetted; have gone through appropriate training and preparations, or have access to specialist assistance; are able to deal with the victim(s) of serious human rights violations, including minors and/or the victim(s) of conflict-related sexual violence ('CRSV'); are trained on how to deal with trauma and how to recognise and respond to post-traumatic stress disorder; are accountable for their actions; and never jeopardise the safety of victims, witnesses or other persons with whom they come into contact.

Where necessary and possible, the Documentation Plan should also include an estimate of costs of the documentation process while taking into account travel, specialised staff, equipment costs, document storage systems and handling costs.<sup>1574</sup>

### 4.3.6 Review

The Documentation Plan should allow for continual reassessment as new information is received.<sup>1575</sup> Also, it is preferable that it sets out specific times for findings to be reviewed and incorporated into the Plan (e.g., at particular phases of the process or at regular intervals).<sup>1576</sup>

## 4.4 PREPARING A RISK ASSESSMENT AND STRATEGY

As part of the Documentation Plan (*see* Section 4.3, above), practitioners should undertake a risk assessment and create a risk strategy to prevent and mitigate harm.<sup>1577</sup>

The risk assessment should identify potential risks to all members of the team, victims and witnesses, and any other source of information.<sup>1578</sup> Whilst the risk assessment should be conducted prior to the

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<sup>1570</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 129

<sup>1571</sup> IICI Investigators Manual, pp. 197.

<sup>1572</sup> OSCE Investigation Manual For War Crimes, Crimes Against Humanity And Genocide In Bosnia And Herzegovina, p. 189.

<sup>1573</sup> PILPG Handbook, pp. 48-49.

<sup>1574</sup> IICI Investigators Manual, p. 196.

<sup>1575</sup> IICI Investigators Manual, p. 195.

<sup>1576</sup> IICI Investigators Manual, p. 196.

<sup>1577</sup> *See also* Section 6.1.3 Risk Assessment.

<sup>1578</sup> PILPG Handbook, p. 39.

commencement of the documentation process, and the strategy to prevent and mitigate risks included within the Documentation Plan, there is **an ongoing obligation to conduct risk assessments throughout the documentation process**.

Where possible, practitioners should seek the advice of security professionals to ensure that their security procedures meet minimum standards. All risk assessments should comply with the principle of ‘Do no harm’ (*see* Section 6.1).

**The risk assessment should, at a minimum:**

- **Identify potential risks:** (i) the potential security risks where the team is located; (ii) the potential or actual effect of gathering information, including on the team itself; and (iii) the potential risks facing the victim(s)/witness(es).
- **Integrate and act upon the findings of the risk assessment:** design and implement an adequate strategy to address the potential risks and integrate them into a Risk Strategy contained in the Documentation Plan (*see* above). Consider actors and/or institutions that can help mitigate certain risks, including, for example, other CSOs or volunteers providing aid to victims and witnesses.
- **Verify whether the risks have been addressed adequately:** risk assessments should continue throughout the documentation process, especially at the beginning of each new activity. If additional threats are identified, practitioners should update the Strategy accordingly.
- **Establish a reporting system** in case any perceived risks are reported to the team by staff members, witnesses, victims or other stakeholders. Accordingly:
  - The risk assessment should seek to obtain the opinion/likely response of local communities and stakeholders prior to, and during, documentation activities; and
  - The risk assessment should establish a way to facilitate safe communication with victims, witnesses or other stakeholders to allow concerns to be promptly received.

#### **4.4.1 Assessing Risks to the Potential Victim/Witness**

Assessing and mitigating risks to victims and witnesses is essential. This is dealt with in more detail in Section 6 (Survivor-Centred Principles), in particular Section 6.1.3 (Risk Assessment).

#### **4.4.2 Assessing Risks to the Practitioner**

Practitioners may be exposed to various types of threats and risks to their physical and emotional health throughout the documentation process. Common threats include: environmental risks; stress, fatigue and vicarious/secondary trauma from interviewing victims or witnesses; specific targeting from the individuals or groups that are being documented and/or their supporters; official pressure coming from national authorities; and sporadic violence and attacks by armed groups.<sup>1579</sup>

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<sup>1579</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 108, 128.

Based on the assessment of risk, practitioners should adjust their activities and plans to attempt to mitigate potential risks or be ready to address them once encountered in the documentation process by implementing the following measures:

#### **4.4.2.1 Security Planning**

- Develop a security plan/policy and establish security protocols for the most likely incidents;
- Abstain from entering areas before they are swept and secured by the responsible authorities;
- Instruct all team members to stay on well-travelled paths, never approach objects that might be unexploded ordinance and ensure the team has emergency protection equipment, such as bullet proof vests or personal protective equipment in case dangerous gas/liquids are released;
- Consider contacting the local **Halo Trust office** and/or asking locals for information on known risk areas; and
- Schedule regular team meetings. Conduct briefings based on source information regarding possible threats and risks, share and analyse security indicators, and adapt sensitive activities accordingly (e.g., location, timing or visibility of meetings).

#### **4.4.2.2 Training**

- Train staff on the aspects of safety and security most relevant to their work (e.g., personal safety, security management, first aid, digital security and defensive driving) and continually evaluate this training;
- Prepare staff to avoid potential emergency risks, such as shelling, air raids, release of dangerous substances, etc.;
- Ensure all staff understand the risks of possible hostile surveillance and receive training on personal and communication security; and
- Increase staff understanding of digital technologies, including how they work and how they do or do not protect information.<sup>1580</sup>

#### **4.4.2.3 Dedicated Resources**

- Ensure that all team members possess all necessary equipment to deal with any risks that may materialise, including medication, fuel, safety gear, communication means, etc.;
- Consider the minimum number of individuals who can undertake the relevant duties and refrain from involving too many persons if their on-site participation is not necessary; and
- When travelling into the crime sites or recently liberated areas, consider travelling with security personnel wherever possible.

#### **4.4.2.4 Develop a Travel Protocol**

- Put in place travel authorisation protocols that ensure travel only takes place following risk assessment/mitigation;

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<sup>1580</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 109.

- Consider whether field visits and documentation activities can be postponed until the area is safe, and avoid decisions that can significantly endanger safety, e.g., entering an area that has not been demined, undertaking documentation steps in an area under regular intense shelling, entering an area under the imminent risk of blockade, etc.;
- Establish contingency communication protocols for certain situations such as precautions to be taken while travelling in vehicles;<sup>1581</sup> and
- Put in place contingency plans,<sup>1582</sup> for example, ensure that the team is prepared for an emergency evacuation by alternative means in case their vehicle breaks down, is lost or destroyed.

#### 4.4.2.5 *Develop a Health and Self Care Protocol*

- Identify and know how to reach the nearest medical facility and other support services, as well as emergency shelters;
- Ensure regular debriefings for staff to minimise the risk of vicarious trauma, and encourage staff to develop a self-care plan and adopt healthy habits;
- Provide access to a trauma-trained counsellor;
- Cap the number of interviews (or documentation activities) staff must undertake per day, and ensure they take adequate breaks between their various tasks; and
- Conduct confidential team meetings to specifically address the emotional impact of any on-going documentation process.<sup>1583</sup>

#### 4.4.2.6 *Media Considerations*

- Adopt a communication strategy, if appropriate. The strategy adopted may call for different approaches at different phases of the criminal justice process (for example, requiring confidentiality during the documentation process but wide publicity when the case is at trial and after to maximise objectives, such as deterring future violations of human rights and/or galvanising international support);
- Ensure all members of the team are familiar with any strategy adopted;<sup>1584</sup> and
- Do not leak information related to victims or witnesses to the media.

### 4.4.3 Assessing Risks to the Documentation Process

In addition to risks to individuals, practitioners should also consider the risks to the documentation process itself. Common threats include the leaking of confidential information and details of witnesses, victims, sources or persons of interest; theft, alteration or destruction of evidence; and

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<sup>1581</sup> European Commission's Directorate-General for Humanitarian Aid, 'Generic Security Guide for Humanitarian Organisations' (2004), pp. 32-33; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 110.

<sup>1582</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 109.

<sup>1583</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 110, 139.

<sup>1584</sup> 'Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organisations' (The Lund-London Guidelines)' (*International Bar Association: Human Rights Institute*, 1 June 2009), p. 6.



hacking, corruption or interception of digital information – all of which can undermine the credibility of the documentation process and the quality of information collected.<sup>1585</sup> Practitioners should implement the following:<sup>1586</sup>

- **Developing a Security Plan/Policy:** an information management and security plan should be developed to handle confidential and sensitive information by team members and also to protect against any unauthorised leakage or alteration of evidence;
- **Developing an Encryption System:** digital information should be stored on a secure hard drive and be sufficiently secured with password protection, regular backups and protected with encryption and security software (*see* Section 5.5);
- **Storing in a Secure Location:** the information collected should be stored in a secure location. In case of physical storage, the storage facility should be properly secured with physical barriers, secure locks, surveillance systems and alarm systems to detect intrusions, fire, water or other emergencies (*see* Section 5.3); and
- **Careful Information-Sharing:** sharing of information with team members should be limited to those on a need-to-know basis. In addition, practitioners may also share information with the International Criminal Court and/or the Ukrainian authorities, and will therefore need to consider the most appropriate process for doing so, and ensure they have obtained the informed consent of the victim/witness (*see* Sections 6.2 and 6.3). Additionally, in certain circumstances, it may be advantageous to make, for example, lists of potential perpetrators public. This may make it harder for the perpetrators to undermine or obstruct the documentation process due to increased scrutiny on their actions and would lend more credibility to the process.<sup>1587</sup>

The above measures should be taken alongside those already mentioned in Sections 4.4.1 to 4.4.2.

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<sup>1585</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 111; *Prosecutor v. Al Jadeed SAL & Al Khayat*, STL-14-05/T/CJ, Judgment, 18 September 2015, para. 40.

<sup>1586</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 111-114; PILPG Handbook, pp. 132-137.

<sup>1587</sup> For instance, the Specialist Prosecutor's Office of the Kosovo Specialist Chambers deemed it necessary to issue an uncharacteristic public notice of charges against Kosovar leaders because of their repeated efforts to undermine and obstruct the work. *See*, Kosovo Specialist Prosecutor's Office, *Press Statement* (24 June 2020).

## 5 COLLECTION AND PRESERVATION OF INFORMATION

This section outlines the specific steps concerning receiving, recording, handling, preserving and authenticating physical, documentary, digital and open-source intelligence ('OSINT')/social intelligence ('SOCINT') information. Before delving into the specifics, the first section will introduce information/evidence, with a particular focus on types of evidence in international criminal trials and requirements related to its admissibility.

With a view to assisting practitioners in understanding the best practice for collecting and preserving information/evidence, this section will address the following themes:

- **5.1 Introduction to Information/Evidence:** understanding what 'evidence' means and the various categories of evidence.
- **5.2 Overview of the Principles of Admissibility:** understanding the principles of the admissibility of evidence.
- **5.3 Collecting, Handling and Preserving Physical Information:** understanding the steps to take when observing and documenting a crime scene, when receiving physical information from a source, and when recording, handling and storing physical information.
- **5.4 Collecting, Handling and Preserving Documentary Information:** understanding how to collect, receive, authenticate, record and store documentary information.
- **5.5 Collecting, Handling and Preserving Digital or Audio-Visual Information:** understanding the general rules for the collection and creation of digital information, assessing the general requirements for handling and preserving digital information and understanding how to authenticate and verify digital information;
- **5.6 Collecting and Preserving OSINT/SOCINT Evidence:** understanding the concepts and definitions of open-source and social intelligence, understanding their uses, limits and pitfalls, understanding the fundamental principles surrounding their use, and highlighting preliminary considerations when designing a workflow.

### 5.1 INTRODUCTION TO INFORMATION/EVIDENCE

The documentation of, and investigations into, international crimes usually involves a significant body of information. Practitioners must ensure that the collected information can be used as evidence during criminal proceedings, i.e., that it is admissible before a national or international court or tribunal, including the International Criminal Court ('ICC'). This sub-section will explain the difference between 'information' and 'evidence', before discussing the different types of evidentiary materials that can be used in both ICC and domestic prosecutions. Finally, it will outline fundamental requirements for the admissibility of evidence at the ICC.

## 5.1.1 What is Evidence?

### 5.1.1.1 'Information' and 'Evidence'

The difference between 'information' and 'evidence' rests on their use in criminal proceedings. Not all information is evidence. A large part of the information gathered while documenting international crimes may only serve as a lead or merely help with the appreciation of the circumstances.

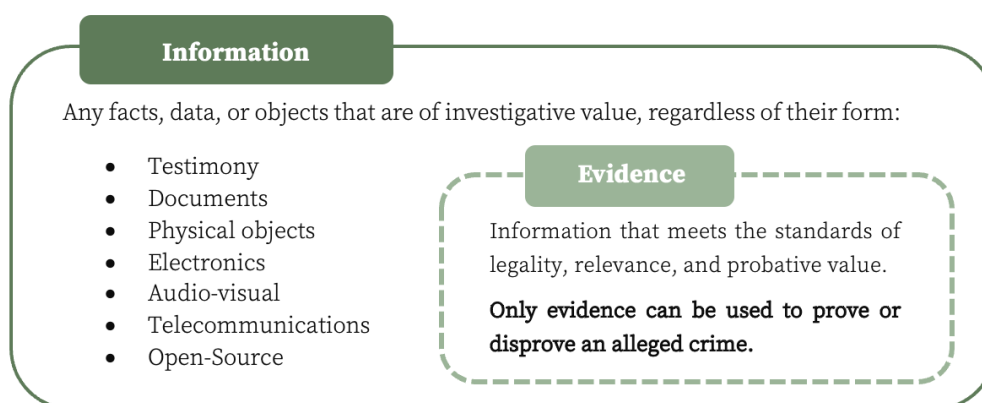


Figure 2: 'Information' and 'Evidence'

### 5.1.1.2 Types of Evidentiary Materials

Evidence can come in many forms, which can be broadly divided into testimonial, documentary, physical<sup>1588</sup> and, in more recent years, audio-visual digital.<sup>1589</sup> This is the type of information practitioners should attempt to collect as each can be relevant for proving the commission of international crimes before domestic and international courts.

Many of these categories overlap, but, at the same time, complement and reinforce one another.<sup>1590</sup> For example, documenting the war crime of attacks on civilian objects can involve the following evidentiary pieces: (i) physical information (e.g., remnants of the weapons or ammunition used); (ii) digital information (e.g., photos and videos of the attack and/or its consequences); (iii) testimonial information (e.g., statements of persons who witnessed the attack); and (iv) documentary information (e.g., military documents ordering the shelling of a civilian object); etc.

<sup>1588</sup> M. Nystedt (ed), C.A. Nielsen and J.K. Kleffner, 'A Handbook on Assisting International Criminal Investigations' (Folke Bernadotte Academy and Swedish National Defence College 2011) ('Nystedt et al., Handbook'), p. 54; S.F. Ribeiro and D. van der Straten Ponthoz, 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law' (2<sup>nd</sup> edn, UK Foreign & Commonwealth Office 2017) ('International Protocol on the Documentation and Investigation of Sexual Violence in Conflict'), p. 143.

<sup>1589</sup> See e.g., International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 143, 148.

<sup>1590</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 143.

Type of Evidence		Additional Information
<b>Testimonial Evidence</b>	The evidence or statement(s) that a witness gives under oath whether written (in the form of a written declaration), oral or through a recorded deposition. <sup>1591</sup>	Includes information from: victims, a wide range of corroborative witnesses related to an incident, insider witnesses or the suspect/ accused. Experts can also testify orally to discuss and elaborate on the results of their analytical reports in court. In addition, victims can deliver victim impact statements at sentencing.
<b>Physical Evidence</b>	Objects, including materials detected through scientific means. <sup>1592</sup>	Examples include: remnants of weapons or ammunition, uniforms, items collected at a crime scene, etc.
<b>Documentary Evidence</b>	Any piece of evidence that can be introduced at a trial in the form of documents, as distinguished from oral testimony.	Examples include, among others: laws, regulations, transcripts, medical records, prison records, newspapers, court records, public statements or announcements, diaries, orders, minutes, decrees and official logbooks (e.g., vehicle usage, guard shift changes, visitor logs, etc.), reports. <sup>1593</sup> Documentary information can be gathered from a variety of public and private sources, including: victims/witnesses, State authorities, CSOs, NGOs, international organisations, national or international media, including radio broadcasts, private individuals and organisations, newspapers and online sources.
<b>Open-Source Evidence</b>	Information that is publicly available or available through request or purchase. <sup>1594</sup>	While open-source information is “not defined by its specific source”, <sup>1595</sup> it can broadly be split into online and documentary open-source information ( <i>see below</i> ).
<b>Documentary Open-Source Evidence</b>	Documentary evidence accessible through public means, such as in print or online.	Useful in establishing the background of a conflict and the extent to which certain information is known. E.g.: books, magazines, articles, microfiche materials, reports, public statements, testimonies, press releases, public records, library holdings, newspapers.

<sup>1591</sup> See e.g., International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), ‘ICTY Manual on Developed Practices’ (2009) (‘ICTY Manual on Developed Practices’), pp. 79-82; ICTY, *Information Booklet for ICTY Witnesses* (Victims and Witnesses Section 2007), pp. 5-6.

<sup>1592</sup> F. D’Alessandra, et al., ‘Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practice (Public International Law & Policy Group (‘PILPG’) 2016) (‘PILPG Handbook’), pp. 84-88. See also, Nystedt et al., *Handbook*, p. 64.

<sup>1593</sup> Nystedt et al., *Handbook*, pp. 62-63. For instance, in the *Bagilishema* case, the Defence tendered a letter written by the accused, contemporaneous to the time of the alleged offences, into evidence. One of the judges wrote in a separate opinion that “the accused certainly could not have envisaged facing a trial of this nature at the time he wrote the letter. Hence it enhances the credibility of the matters urged therein”: *Prosecutor v. Bagilishema*, ICTR-95-1A-T, *Separate Opinion of Judge Asoka de Z. Gunawardana*, 7 June 2001, para. 119.

<sup>1594</sup> N. Mehendru and A. Koenig, *Open Source Evidence and the International Criminal Court* (*Harvard Human Rights Journal*, 15 April 2019).

<sup>1595</sup> Human Rights Center: UC Berkeley School of Law, ‘The New Forensics: Using Open Source Information to Investigate Grave Crimes’ (2017), p. 7.

<b>Online Open-Source Evidence</b>	Information publicly available on the internet.	Verification <sup>1596</sup> and authentication <sup>1597</sup> can demonstrate the reliability and authenticity of this type of evidence. E.g.: online news articles; expert and NGO reports; images/videos posted on social media (Facebook, YouTube, Twitter, Instagram, LinkedIn, etc.); <sup>1598</sup> geospatial/satellite imagery; mapping data; leaked confidential documents; information on websites, online forums or public WhatsApp Groups.
<b>Digital and Audio-Visual Evidence</b>	<i>Any privately owned</i> digital or audio-visual content that would not otherwise be classified as open-source information.	Digital evidence may help establish the perpetrator's intent, whereabouts at the time of a crime, relationship with other suspects, pattern of movement or the existence of a common plan. <sup>1599</sup> E.g.: electronic health records; videos or photographs; <sup>1600</sup> CCTV footage; evidence generated by private computers and/or cell phones, such as app data or emails, or internet search history.
<b>Telecommunications Evidence</b>	Falls under the umbrella of audio-visual and digital evidence and covers a wide range of potential forms of information relating to telecommunications.	Can be helpful for corroboration and may provide indications of networks, such as familial ties or chains of command. E.g.: the records of communications service providers, such as subscriber records; handset details (including applications and audio-visual files); cell site information; billing information and payments; network reports and financial history; call data records, which may include metadata of the call but not content. <sup>1601</sup>

Table 80: Types of Evidence

### 5.1.2 Categories of Evidence

This sub-section presents an overview of the different categories of evidence admissible (*see* Section 5.2.1) before international criminal courts and tribunals: direct (e.g., testimonial), indirect (circumstantial and hearsay), exculpatory, corroborative, expert and confidential.

<sup>1596</sup> Verification is a term used within open source investigations. It refers to establishing that the content is what it alleges to be, and, if an image or video, that it was taken at a specified location, date and time: K. Matheson, 'Video as Evidence Field Guide' (WITNESS 2016) pp. 52.

<sup>1597</sup> In the context of online open source evidence, authentication means ensuring that the online content has not been doctored or manipulated in one form or another. In order to achieve a higher degree of authenticity, it is always better to get the original piece of content from the poster.

<sup>1598</sup> See e.g. International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 152.

<sup>1599</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 153.

<sup>1600</sup> The ICC explicitly provides for the admissibility of video evidence as prior recorded testimony: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 69(2); ICC, Rules of Procedure and Evidence, reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York* (3-10 September 2002) ICC-ASP/1/3 and Corr.1 ('ICC Rules of Procedure and Evidence'), Rule 68. See also, *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, 17 December 2010 ('*Katanga* Decision on the Prosecutor's Bar Table Motions'), para. 24(d): video may be admitted "as evidence that speaks for itself and may be regarded, in this respect, as real evidence" if its originality and integrity is established.

<sup>1601</sup> All these types of telecommunications data were used in *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC. See, Special Tribunal for Lebanon, 'Primer on Telecommunications Evidence: Guide to Understanding the Testimony of *Ayyash et al.*' (undated), pp. 3-4.

### 5.1.2.1 Direct and Indirect Evidence

Practitioners should seek to collect both direct and indirect evidentiary materials for whichever purpose they may be collecting information (e.g., domestic or international trials, universal jurisdiction cases, advocacy reports, etc.).

	Explanation	Examples
<b>Direct evidence</b>	Directly proves a fact without the need for additional inferences to be made.	<ul style="list-style-type: none"> <li>• The testimony of a witness who saw a missile hitting a school or a soldier shooting an unarmed civilian.</li> <li>• A video showing prisoners of war being executed by the perpetrators.</li> <li>• A military document ordering an armed formation to shell an undefended village, where no troops or military installations of the adversary were stationed.</li> </ul>
<b>Indirect evidence</b>	Does not directly prove a fact, but, when corroborated, allows for a reasonable inference to be made that a fact exists. <sup>1602</sup> It can be important for establishing a fact in international trials, e.g., where there are no eye-witnesses or related documents. <sup>1603</sup>	<ul style="list-style-type: none"> <li>• Witnesses who did not see the exact moment of the attack on the residential district, but were able to identify the consequences, including the character of the damage and injuries.</li> <li>• To infer the involvement of the accused in the killing of a victim, the following circumstantial factors will suffice: (i) the accused played a prominent role in the abduction of the victim; (ii) soldiers detained the victim at the military camp; (iii) the victim was killed; (iv) soldiers disposed of his body; and (v) the accused monitored and controlled the aftermath of the killing.<sup>1604</sup></li> </ul>

Table 81: Examples of Direct and Indirect Evidence

For indirect/circumstantial information to add any real value to a case, practitioners should gather information that excludes all other reasonable inferences that can be drawn from the piece of information.<sup>1605</sup>

#### 5.1.2.1.1 Testimonial Evidence

**Testimonial evidence** is a document<sup>1606</sup> or audio-visual recording<sup>1607</sup> containing the recollections, observations or opinions given, regardless if under oath,<sup>1608</sup> by an interviewee, who can be a victim,

<sup>1602</sup> See, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgment, 20 February 2001 ('*Delalić et al. Appeal Judgment*'), para. 458; D. Groome, *Handbook of Human Rights Investigation* (2<sup>nd</sup> edn, Createspace 2011) ('Groome Handbook'), p. 41.

<sup>1603</sup> M. Klamberg, *Evidence in International Criminal Trials* (Brill 2013) ('Klamberg, *Evidence in International Criminal Trials*'), p. 408.

<sup>1604</sup> This is illustrated in *Prosecutor v. Hategekimana*, ICTR-00-55B-A, Appeals Judgement, 8 May 2012, para. 68.

<sup>1605</sup> See, *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, para. 219; Groome Handbook, p. 41.

<sup>1606</sup> ICTY Manual on Developed Practices, pp. 79-81.

<sup>1607</sup> See e.g., ICTY Victims and Witnesses Section, *Information Booklet for ICTY Witnesses* (2007).

<sup>1608</sup> Testimonial evidence *stricto sensu* refers to sworn testimony in the criminal proceedings whereby a deliberately untruthful witness can be prosecuted for perjury. However, it can also be found in other places, e.g., an investigator's report or an interpreter's notes, so long as the accounts come from the interviewee. Such statements may not be admissible due to the lack of formality, but might still need to be turned over to the Defence. While the signed statement is tidy and formal, a contemporaneous note might better record the interviewee's original words, and an unsigned draft could show any 'evolution' of a witness' story. As such, they are regarded as testimonial evidence. This is important to understand in the context of obtaining informed consent, and in the planning of interview procedures. See Sections 6.2 and 6.6.



witness, community leader, insider, suspect, investigator<sup>1609</sup> or expert (*see below*, for more information on expert evidence). For more information on the principles relating to witness statements and interviews, including how to conduct a survivor-centred interview or interview particularly vulnerable individuals, *see* Section 6.6, below.

#### 5.1.2.1.2 *Hearsay Evidence*

**Hearsay evidence** is evidence offered in court of a statement made out of court to prove the truth of the matter asserted.<sup>1610</sup> It can be in oral or documentary form;<sup>1611</sup> first hand (i.e., a witness recounts information provided to them by another person); second hand; or more remote (i.e., information that has passed between two or more persons before being conveyed to the witness appearing in court).<sup>1612</sup>

According to international practice, hearsay evidence is generally admissible in court.<sup>1613</sup> The only issue is the weight to be ascribed to it.<sup>1614</sup> This will depend upon the various circumstances that surround hearsay evidence<sup>1615</sup> including, e.g., whether the statement was: provided under oath; subject to cross-examination; given before a judge; first-hand or removed; made through many layers of translation; or made contemporaneously to the events.<sup>1616</sup>

#### 5.1.2.2 *Exculpatory Evidence*

**Exculpatory evidence** is evidence that may point to the innocence of the accused.<sup>1617</sup> Practitioners should make every effort to explore any exculpatory evidence.<sup>1618</sup>

#### 5.1.2.3 *Corroborative evidence*

**Corroborative evidence** is evidence from which a reasonable inference can be drawn that confirms and supports other categories of evidence or in some material way connects the relevant person with

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<sup>1609</sup> Written testimony of an investigator is often done through a self-interview, which therefore resembles a monologue.

<sup>1610</sup> ADC-ICTY, Manual on International Criminal Defence: ADC-ICT Developed Practices within the framework of the War Crimes Justice Project (UNICRI, ADC-ICTY & OHCHR 2020) ('ADC-ICTY Manual on International Criminal Defence'), p. 78; UK Crown Prosecution Service, 'Code for Crown Prosecutors' (Legal Guidance, 10 September 2021).

<sup>1611</sup> ADC-ICTY Manual on International Criminal Defence, p. 78; *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11, Redacted Version of the Common Legal Representative for Victims' Joint Reply to the "Ruto Defence Request for Judgment of Acquittal" and to the "Sang Defence 'No Case to Answer' Motion", 29 January 2016 ('Ruto & Sang Common LRV Joint Reply'), para. 46.

<sup>1612</sup> ADC-ICTY Manual on International Criminal Defence, p. 87.

<sup>1613</sup> *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, Prosecution's Submissions on Admissibility of Hearsay Evidence, 9 July 2010, para. 6; *Prosecutor v. Chui*, ICC-01/04-02/12 A, Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute", 7 April 2015, para. 226. *See also*, ICTY, 'Blaskic case: Defence objection to the admission of hearsay is rejected' (Press Release No. CC/PIO/286-E, 23 January 1998); Klamberg, *Evidence in International Criminal Trials*, pp. 370-372.

<sup>1614</sup> *Ruto & Sang Common LRV Joint Reply*, para. 41.

<sup>1615</sup> *Prosecutor v. Popović et al.*, IT-05-88-A, Appeal Judgment, 30 January 2015 ('Popović et al. Appeal Judgment'), para. 1307, fn. 3787 referring to *Prosecutor v. Karera*, ICTR-01-74, Appeal Judgment, 2 February 2009, para. 39.

<sup>1616</sup> *See e.g.*, Klamberg, *Evidence in International Criminal Trials*, p. 371 referring to *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 ('Kordić & Čerkez Decision on Appeal Regarding Statement of a Deceased Witness'), paras 23-28.

<sup>1617</sup> Rome Statute, Article 67(2).

<sup>1618</sup> Groome Handbook, p. 254.

the offence. It strengthens or confirms what other evidence shows.<sup>1619</sup> Corroboration is also relevant to the assessment of the credibility and weight to be accorded to the testimony of a witness.<sup>1620</sup>

The potential range of types and sources of corroborative evidence is vast and will depend upon the context in which the incident in question has taken place. Corroborative evidence may come from, e.g., the person who reported the crime (other than the victim); persons who saw, heard or heard about the incident; witnesses in contact with the victim leading up to the crime; witnesses who spoke with the victim after the crime; and the victim's neighbours, colleagues, teachers, etc.

#### 5.1.2.4 Expert Evidence

Experts are persons with specialised skills and knowledge acquired through training who may be called to assist the court in dealing with issues that are beyond the understanding and experience of the average judge, such as specific issues of a technical nature, or requiring knowledge in a particular field.<sup>1621</sup>

#### 5.1.2.5 Confidential Evidence

Practitioners must exercise extreme caution when agreeing to accept evidence confidentially. Any decision to accept evidence confidentially should be in writing and should reflect a uniform policy. Additionally, practitioners should ensure that those they obtain evidence from are aware that, while the Rome Statute allows the Prosecutor to maintain the confidentiality of some information during proceedings as long as it is not used for anything other than generating new evidence, this is an exception and should not be expected.<sup>1622</sup>

## 5.2 OVERVIEW OF THE PRINCIPLES OF ADMISSIBILITY

The admissibility rules before courts and tribunals determine whether particular pieces of information may be received by a court as evidence in support of a fact in question.<sup>1623</sup> Practitioners

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<sup>1619</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 61.

<sup>1620</sup> *Prosecutor v. Milošević*, IT-98-29/1-A, Appeal Judgment, 12 November 2009, para. 215.

<sup>1621</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998 ('Akayesu Decision on Defence Motion'), p. 2; *Prosecutor v. Semanza*, ICTR-97-20-A, Appeal Judgment, 20 May 2005, para. 303; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeal Judgment, 28 November 2007 ('Nahimana et al. Appeal Judgment'), para. 198; *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003 ('Brđanin Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown'); *Prosecutor v. Jokić*, IT-05-88-R77.1-A, Appeal Judgment on Allegations of Contempt, 25 June 2009, para. 18; *Popović et al.* Appeal Judgment, para. 375; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Public redacted version of "Reply on behalf of Mr Ntaganda to 'Prosecution's response to 'Supplementary submissions on behalf of Mr. Ntaganda in relation to proposed Expert witnesses'", 23 February 2016, paras 8, 11; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Defence Preliminary Challenges to Prosecution's Expert Witnesses, 9 February 2016 ('Ntaganda Decision on Defence Preliminary Challenges'), para. 7; *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11, Decision on Sang Defence Application to Exclude Expert Report of Mr. Hervé Maupéu, 7 August 2013 ('Ruto & Sang Decision on Sang Defence Application to Exclude Expert Report of Mr. Hervé Maupéu'), para. 11. See also, ICTY Manual on Developed Practices, pp. 25-26; S. Choudhry, 'Women's Access to Justice: A Guide for Legal Practitioners' (Council of Europe, October 2018) p. 20; UNODC, 'Handbook On Effective Prosecution Responses To Violence Against Women And Girls' (Criminal Justice Handbook Series 2014), pp. 111-112.

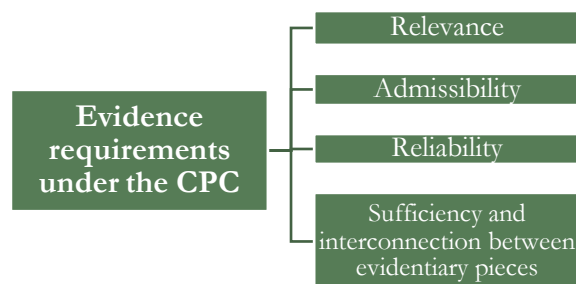
<sup>1622</sup> Rome Statute, Article 54(3)(e).

<sup>1623</sup> 'Admissibility of Evidence' in J. Law & E.A. Martin, *A Dictionary of Law* (7<sup>th</sup> edn, OUP 2009).

need to be aware of these admissibility principles to ensure that the information they collect can eventually be admissible as evidence before a court of law. When collecting information on international crimes, practitioners should be cognisant of the applicable domestic rules on admissibility and the rules in any international court (i.e., the ICC) that also has jurisdiction.

The Ukrainian Criminal Procedure Code ('CPC') sets out several requirements for information to be admissible in criminal proceedings. They are:

- **Relevance:** relevant information directly or indirectly confirms the existence or absence of circumstances related to criminal proceedings, “as well as the credibility or non-credibility, possibility or impossibility of using other evidence”;<sup>1624</sup>
- **Admissibility:** information is admissible if it has been obtained in accordance with the procedure established by the CPC.<sup>1625</sup> Information is inadmissible if it was obtained in violation of fair trial rights, such as undertaking procedural measures without a warrant, violating the accused’s right to defence/cross-examination, obtaining information by using torture, etc.;<sup>1626</sup>
- **Reliability:** information is reliable when it is possible to establish the true circumstances of the case based on it;<sup>1627</sup> and
- **Sufficiency and interconnection between pieces of information:**<sup>1628</sup> a piece of information is sufficient when, together with other pieces of information, it is capable of establishing the presence or absence of the circumstances of the case which are being proven.<sup>1629</sup>



*Figure 3: Evidence Requirements under the CPC*

<sup>1624</sup> Criminal Procedure Code of Ukraine of 13 April 2012 No. 4651-VI ('CPC'), Article 85(1).

<sup>1625</sup> CPC, Article 86(1).

<sup>1626</sup> CPC, Article 87(2).

<sup>1627</sup> CPC, Article 94(1), Article 358(3). The CPC does not define the concept of “reliability”. Relevant definitions are, however, provided in other Ukrainian procedural codes: *see e.g.*, Civil Procedure Code of Ukraine of 18 March 2004, No. 1618-IV, Article 79(1); Code of Administrative Procedure of Ukraine of 6 July 2005, No. 2747-IV, Article 75(1).

<sup>1628</sup> CPC, Article 94(1).

<sup>1629</sup> Similar to the concept of “reliability”, the concept of “sufficiency” and the notion of “interconnection” are not defined in the CPC. Relevant definitions are provided in other Ukrainian procedural codes: *see e.g.*, Civil Procedure Code of Ukraine of 18 March 2004, No. 1618-IV, Article 80; Code of Administrative Procedure of Ukraine of 6 July 2005, No. 2747-IV, Article 76.

For information to be ‘admissible’ before the ICC, it must be relevant, reliable and its probative value must outweigh any prejudicial effect on the trial’s fairness.<sup>1630</sup>

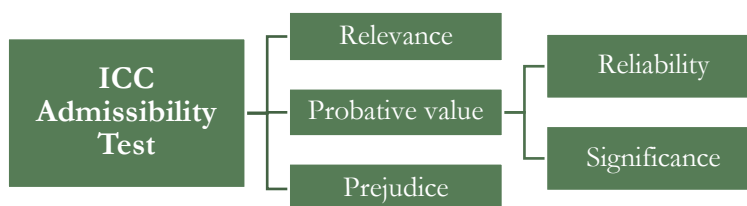


Figure 4: ICC Admissibility Test

Provided that these tests are satisfied at the end of the trial, the court will also assess the relative importance attached to each item of evidence (i.e., the ‘evidentiary weight’).<sup>1631</sup>

Practitioners should be mindful of these tests when collecting information:

- **Relevance:** examines whether a piece of information pertains to the matters being documented and makes the existence of the fact more or less probable.<sup>1632</sup> For example, a video showing the accused shooting at a crowd of civilians makes it more probable that the accused fired at civilians, and thus committed the crime of wilful killing.
- **Probative value:** addresses how a piece of information proves or demonstrates something at issue.<sup>1633</sup> For example, a witness statement describing a suspects’ activities in an occupied village would be highly probative of their presence therein. The assessment of probative value is centred around two issues – reliability and significance:
  - **Reliability:** information is reliable if it is “voluntary, truthful and trustworthy”.<sup>1634</sup> This involves an assessment of the information’s *accuracy* (i.e., plausibility and clarity);<sup>1635</sup> *credibility* (i.e., the extent it can be trusted);<sup>1636</sup> and *authenticity* (i.e., whether the it is genuine).<sup>1637</sup>

<sup>1630</sup> Rome Statute, Article 69(4); ICC Rules of Procedure and Evidence, Rule 64; *Katanga* Decision on the Prosecutor’s Bar Table Motions, para. 16 et seq; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Admissibility of Four Documents, 13 June 2008 (*Lubanga* Decision on the Admissibility of Four Documents), paras 25-32; C. Gosnell, ‘Admissibility of Evidence’ in K.A.A. Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (OUP, 2010) (‘Gosnell ‘Admissibility of Evidence’ (2010)’), p. 376.

<sup>1631</sup> *Katanga* Decision on the Prosecutor’s Bar Table Motions, para. 13.

<sup>1632</sup> *Prosecutor v. Kilolo et al.*, ICC-01/05-01/13, Judgment Pursuant to Article 74, 19 October 2016 (*Kilolo et al.* Judgment Pursuant to Article 74’), para. 195; *Lubanga* Corrigendum to Decision on the Admissibility of Four Documents, para. 27; *Katanga* Decision on the Prosecutor’s Bar Table Motions, para. 16.

<sup>1633</sup> Rome Statute, Article 69(4). See also, Gosnell ‘Admissibility of Evidence’ (2010), p. 386.

<sup>1634</sup> *Lubanga* Decision on the Admissibility of Four Documents, para. 28, fn. 81 referring to *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999 (*Aleksovski* Decision on Prosecutor’s Appeal on Admissibility of Evidence’), para. 15.

<sup>1635</sup> *Nahimana et al.* Appeal Judgment, para. 194.

<sup>1636</sup> *Prosecution v. Naletilić & Martinović*, IT-98-34-A, Appeals Judgment, 3 May 2006, para. 402. See also, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Admissibility of Intercepted Communications, 7 December 2007, para. 34.

<sup>1637</sup> Anderson et al., p. 380; S. Dubberley, A. Koenig and D. Murray, ‘Introduction: The Emergence of Digital Witnesses’ in S. Dubberley, A. Koenig and D. Murray, *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* (OUP 2020), p. 10.

- **Significance:** helps the Court in reaching a conclusion about the (non-)existence of a material fact or in assessing the reliability of other evidence in the case.<sup>1638</sup> Information can be deemed significant in two ways: (i) by significantly helping the Court reach “a conclusion about the existence or non-existence of a material fact”;<sup>1639</sup> or (ii) by helping the Court assess “the reliability of other evidence in the case”.<sup>1640</sup>
- **Prejudicial effect:** even if a piece of information is relevant and of probative value, it can nevertheless be excluded if it can prejudice the trial’s fairness, including the accused’s rights or the fair evaluation of testimony or other evidence.<sup>1641</sup> According to the Rome Statute, information will not be admitted if obtained “by means of violation of [the Statute] or internationally recognised human rights” if the violation “casts substantial doubt” on its reliability.<sup>1642</sup>

When determining whether a piece of information is admissible, practitioners must consider:

Has a violation of an internationally recognised human right taken place?	
No	The information can be admitted provided that other requirements (relevance, probative value, etc. – see above) are met.
Yes	The information is not automatically excluded. Practitioners must assess whether the violation of the accused’s rights was so serious and substantial as to impact the reliability of the information.

Figure 5: Determining Whether a Violation of an Internationally Recognised Human Right Took Place

The following are examples of violations of fundamental rights that can impede the rights of the accused, the fairness of the trial and the reliability of information:

- **Torture, inhumane or degrading treatment.** Confessions obtained as a result of torture or ill-treatment are recognised as inadmissible under human rights law.<sup>1643</sup> If such information were to be admitted, that would constitute a serious violation of the accused’s right to a fair trial.<sup>1644</sup>
- **Right to privacy.** Issues related to the admissibility of information can be connected, for example, to illegal interceptions of phone conversations or abusive home searches.<sup>1645</sup>

<sup>1638</sup> *Katanga* Decision on the Prosecutor’s Bar Table Motions, para. 34.

<sup>1639</sup> *Katanga* Decision on the Prosecutor’s Bar Table Motions, para. 34.

<sup>1640</sup> *Katanga* Decision on the Prosecutor’s Bar Table Motions, paras 34-35.

<sup>1641</sup> *Prosecutor v. Ruto & Sang*, ICC-OI/09-01/11, Decision on the Prosecution’s Request for Admission of Documentary Evidence, 10 June 2014, para. 16; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Response to “Prosecution’s First Request for the Admission of Evidence from the Bar Table”, 15 July 2016, para. 6. *See also*, Rome Statute, Article 69(4).

<sup>1642</sup> Rome Statute, Article 69(7)(a).

<sup>1643</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNTS 1465 (“CAT”), Article 15: “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”.

<sup>1644</sup> *Jalloh v. Germany*, Application No. 54810/00, Judgement, 11 July 2006, para. 105: “[t]he use of evidence obtained in violation of Article 3 [of the ECHR] in criminal proceedings raises serious issues as to the fairness of such proceedings. In its view, incriminating evidence (...) obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct”.

<sup>1645</sup> *Schenk v. Switzerland*, Application No. 10862/84, Judgement, 12 July 1988, para. 48.

However, unlike information resulting from torture, information resulting from a violation of the right to privacy will not always breach the right to a fair trial.<sup>1646</sup>

### 5.2.1 Evidentiary Weight

Evidentiary weight is the relative importance attached to an individual item of evidence in deciding whether a certain issue is proven or not.<sup>1647</sup>

For instance, an authentic but low clarity video of a suspect waving a knife may be given less weight than an eyewitness to the attack, provided that the witness's testimony is deemed reliable and credible. When considering the weight of evidence, courts will consider the overall nature of the evidence (e.g., whether it was generated through technology or produced by a person with interest in the process) and whether it is direct, indirect or hearsay. Less weight may be afforded to witness evidence that has not been subjected to cross-examination or given under oath (e.g., witness statements or summaries).<sup>1648</sup>

## 5.3 COLLECTING, HANDLING AND PRESERVING PHYSICAL INFORMATION

The standards below outline the basic principles that should be maintained if practitioners collect or receive physical information. Physical information refers to physical objects, e.g., weapons or ammunition (such as bullet casings or a knife used in an attack), explosive devices (including shrapnel), human remains, communications equipment and prints (such as fingerprints, footprints, cut marks, tool marks, etc.) found at a crime scene. Generally, practitioners will come into possession of physical information in two ways: collecting it from a crime scene, or receiving it from a source, such as a witness or victim of the crime.

Observation and documentation of crime scenes and the collection of physical information may involve risks to health and safety. **Practitioners should exercise extreme caution when collecting and handling physical information or accessing crime scenes.** It usually requires a high degree of training and expertise. However, if owing to the circumstances, you are required to collect, handle or preserve physical information, then follow the principles in this section, which provide guidance on: (i) the steps required to observe and document a crime scene; (ii) how to received information from a source; (iii) how to safely record, handle and store physical information.

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<sup>1646</sup> *Lysyuk v. Ukraine*, Application No. 72531/13, Judgement, 14 October 2021, para. 66-76: “[t]he evidence in question [which was obtained by the prosecution authorities in breach of Article 8 of the Convention, which provides for the right to respect for privacy] played a limited role in the applicant’s conviction. [...] given the above considerations concerning the role the disputed evidence played and given its reliability, the applicant’s submissions could clearly not have been decisive for the outcome of the proceedings. There has therefore been no violation of Article 6 § 1 of the Convention on account of the admission of the recording of the applicant’s conversation [...] in evidence against him”; *Lubanga Decision on the Confirmation of Charges*, paras 79-90.

<sup>1647</sup> *Katanga Decision on the Prosecutor’s Bar Table Motions*, para. 13.

<sup>1648</sup> N.A. Combs, *Evidence* (William & Mary Law School 2011), p. 329, fn. 70 citing *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defense Witnesses and on the Giving of Evidence by Video Link, 25 June 1996, para. 21. See also, *Aleksovski Decision on Prosecutor’s Appeal on Admissibility of Evidence*, para. 15; *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, para. 93.



### 5.3.1 Observing and Documenting a Crime Scene

The management of a crime scene is a highly technical process that requires the expertise of a professional criminal investigator. An inexperienced practitioner may easily contaminate a crime scene in a variety of ways. Therefore, as a general rule:

- Do not attempt to enter, secure, manage, or intervene in, a crime scene; and
- If practicable, contact the appropriate domestic or international authorities within your locale to process the crime scene.

Only observe, document and, if needed, collect information from a crime scene if:

- Professional investigators are not willing or able to access the crime scene in time to preserve the information contained therein;
- Information arising from the crime scene would be lost or damaged if the crime scene is not secured; and
- You are confident of your expertise and have carried out appropriate risk assessments (*see* Section 4.4) to ensure you and others remain safe.

In the event that these conditions are met, take the following steps when observing and documenting the crime scene.

#### 5.3.1.1 *Step One: Planning and Safety*

Prior to visiting a crime scene, a documentation team should be formulated, headed by a team lead. The team lead must rigorously oversee, direct and coordinate the work of all team members.

A **plan** should be created by the team lead and followed by all team members prior to entering the crime scene. This should include a comprehensive briefing of all team members on safety and security. The plan should include all equipment and tools the team will need, including recording devices and protective clothing. The plan should also include a description of how evidence will be collected to ensure its chain of custody. For more information, *see* Section 4.

When approaching the crime scene, the team lead should consider the safest approach and ensure that no accidental damage to potential evidence is done. Take a note of anything you observe on your approach to the crime scene which may be relevant.

**First, practitioners must make sure that the site is safe and free of any dangers**, such as mines, unexploded devices, traps or other hidden perils (e.g., biological, chemical or other hazardous material). Apart from the normal risks of armed conflict, perpetrators of human rights violations often have an interest in destroying information and may consider violent means to do so.

As a general rule, the safety of the team members and of any other person found at the crime scene should always take priority over information gathering.

When assessing the crime scene:<sup>1649</sup>

- Identify and plan for escape routes – take into consideration how you, your team and the information gathered can be transported from the location. *See also* Section 4.4.
- Identify nearby medical facilities and your ability to access medical care if needed.
- Locate other actors working in the area, and determine the trustworthiness of the local authorities and whether collaboration is appropriate.
- Ensure capable personnel have swept the area for landmines, unexploded ordnance and booby traps.
- Make initial observations (look, listen, smell) to assess the safety of the scene.
- Wear protective clothing (such as protective helmets, gloves and shoes).
- Prioritise assisting any injured persons found at the scene through first aid, if need be.

#### 5.3.1.2 Step Two: Identifying the Crime Scene

Once the safety of the area is established, the next step is to identify the crime scene. This requires the practitioner to:<sup>1650</sup>

- **Identify the central point(s) of the crime scene**, i.e., the exact location where the crime occurred (e.g., a street where a person has been shot or a room where a violent act occurred).
- **Consider whether there are any possible secondary crime scenes**. Physical information may be found in areas that are not necessarily in the direct vicinity of the crime. The practitioner should attempt to identify all locations where physical information may be found (i.e., the investigative scenes).
- **Cordon off an area around the crime scene** that is large enough to contain all relevant physical information.

#### 5.3.1.3 Step Three: Securing the Crime Scene

Once the crime scene has been identified, practitioners then need to secure the scene with a view to maintaining the integrity of the documentation process and further investigations and ensure that nothing interferes with the information contained within.<sup>1651</sup> This requires the practitioner to:<sup>1652</sup>

- Accurately record the location of the site;
- Establish one common entry/exit point to the crime scene;
- Monitor access to the crime scene;
- Keep a log of all those who enter the crime scene;
- If the crime scene is outdoors, promptly photograph and shelter it from the weather; and

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<sup>1649</sup> PILPG Handbook, pp. 43, 80-82; Nystedt et al., Handbook, pp. 64-65.

<sup>1650</sup> PILPG Handbook, pp. 80 - 84; Groome Handbook, pp. 80-86.

<sup>1651</sup> Groome Handbook, p. 80-81.

<sup>1652</sup> Groome Handbook, pp. 85-86; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 190; PILPG Handbook, pp. 80-82.

- Ensure that everyone who enters the crime scene refrains from contaminating it. This can be done by avoiding the use of any facilities available at the scene (such as telephones and bathrooms); not eating, drinking or smoking within the scene; not moving anything/anybody within the scene (except in situations where it is absolutely necessary); not touching or handling objects found in the crime scene; and not littering or spitting.

The presence of practitioners at a crime scene will likely generate interest amongst the local population who may gather in the area. It is thus vital that the perimeter not just be used as a means to keep these individuals out, but also to position people on the perimeter who can interact with the local population and establish if any of them knows anything about the scene and the events that transpired. The names and contact information of such individuals should be recorded so interviews can be arranged at a later stage, if necessary.

Where possible, consult with local or military personnel to assist with security. In the likely event that the local police have been dispersed by the hostilities or occupation, some form of security will also need to be established to keep the crime scene intact; and to prevent looting, souvenir collection and other criminal activity from occurring.

#### **5.3.1.4 Step Four: Observing the Crime Scene**

After the crime scene is secured, the next step is to record an overview of the scene in as much detail as possible in the Documentation Folder, including any relevant attachments (e.g., diagrams, sketches, explanations, videos, etc.), and in your notebooks (*see* Sections 4.1.2 and 4.1.2.1). The purpose of this is to produce **an accurate and reliable account of the original state of the crime scene**.

It is critical that the scene is comprehensively **mapped** by drone, video, photographs and sketches. At this early stage, the significance of this recording may not be immediately obvious but may prove critical later when crimes are identified and need to be established. Sketches help to ensure that the position of relevant objects and distances are adequately recorded.

**Prepare a detailed bird's eye sketch of the crime scene** (including an indication of the scale used in the drawing, signed/dated and stored), which indicates:

- The direction of north;
- The central point of the crime scene;
- The location(s) where the crime(s) occurred;
- The location of identified information or objects (including human remains). Such objects should be labelled and described;
- Any landmarks, roads or buildings with a label and description; and
- Any measurement of pertinent objects and the spaces between them.

At this stage, the team lead must establish a secure area for temporary information storage, consistent with the need to preserve the chain of custody (*see* Section 4.2.2, above).

Practitioners also need to think about places of interest that are not actually crime scenes, such as the building/encampments within which the Russian soldiers lived, which may contain a wealth of information of evidential value regarding identification of units, pillaged goods, graffiti, intent, etc.

#### **5.3.1.5 Step Five: Walk Through and Initial Documentation**

Once the scene has been mapped, sketched and photographed, the team lead must then conduct a walk-through and initial documentation of the scene.<sup>1653</sup> The walk-through provides the team lead with an overview of the entire scene and the condition of the scene should be noted in your notebook. It also provides the first opportunity to identify valuable and fragile evidence and determine initial documentation procedures. An established path of entry should be used to avoid contamination.

During the walk-through, practitioners should:<sup>1654</sup>

1. Record facts regarding the crime scene, not personal opinions.
2. Ensure that all records are accurate, detailed and professionally kept for the future (note they may be required in future criminal proceedings).
3. Note the date/time of the potential incident and record the date/time the team arrived and left.
4. Note the location and size of the crime scene through GPS coordinates and by hand on a map (e.g., using drones). The map should be signed, dated and preserved.
5. Note the type of crimes that may have occurred at the crime scene.
6. Note all additional observations. For example:
  - Any vantage points used to observe the crime scene;
  - How the crime scene looked on arrival;
  - Whether anything has been moved within or removed from the crime scene;
  - The location, description and measurements of any potentially valuable information found or discovered (including any deceased victims);
  - Any individuals present at or leaving the crime scene and their activities; and
  - The names and identifying details (full names, date of birth, ID details, place of residence, contact information, etc.) of potential witnesses.
7. Supplement or substitute the written record with voice recordings, photos and videos where more convenient than written observations.

Following the walk-through, the team lead should assess the need for additional personnel, such as forensic or ballistics experts. It is important that such experts are included within documentation teams from the outset, however, at certain crime scenes, multiple experts may be needed. This will be the case where, for example, multiple buildings appear to have been destroyed by indiscriminate

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<sup>1653</sup> US Bureau of Justice Assistance, 'Crime Scene Investigation: A Guide for Law Enforcement' (September 2013), pp. 11-12.

<sup>1654</sup> Groome Handbook, p. 94; Institute for International Criminal Investigations ('IICI'), 'Investigators Manual' (2014) ('IICI Investigators Manual'), p. 264; M. Bergsmo and W.H. Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes' in *Manual on Human Rights Monitoring* (Norwegian Centre for Human Rights 2008), pp. 14-16; PILPG Handbook, pp. 82-84; P. Laska, *Interface: A Guide for Professionals Supporting the Criminal Justice System* (Springer's Forensic Laboratory Science Series 2011), pp. 1-3.

weapons. All additional experts brought onto the scene must be documented, along with their assignments.

#### 5.3.1.6 Step Six: More Focused Documentation

While Step Five involves the general documentation of the crime scene with drones, etc., Step Six requires the practitioner to undertake a more specific and focused documentation based upon a shared understanding of the focus of the documentation process. It may be logical to conduct this step simultaneously with Step Seven (Comprehensive Collection of Physical Information).

The team lead should ensure that the crime incidents/events are *specifically* documented through photographs, video recordings, sketches, measurements and notes. All of these items can be further attached to the Documentation Folder (see Section 4.1.2). Under the direction of the team lead, when appropriate, practitioners should document the scene in the following ways:

- **Photographs:** Photographs are useful for documenting the overall scene, as well as close-up coverage of notable parts of the scene. The photography route through the crime scene should be planned. Transient objects such as bloodstains or latent prints should be photographed as soon as possible. Photographs should move from the exterior to the interior of the crime scene, and from general to specific focus. For more information, *see* Section 5.5.1.1.
- **Video:** Video recordings may be made to supplement the photographs. For more information, *see* Section 5.5.1.1.
- **Sketches:** Sketches should be made of the immediate area of the crime scene, noting the relative location of items of evidence, and the distances to adjacent buildings and landmarks. Sketches are an important way to record the spatial relationship between objects. The sketch should be completed before anything is moved or destroyed. Accurate measurements should be included. Proportional measurements can be used to calculate key issues, such as, for example, bullet trajectory.
- **General notes:** Document the location of the scene, and the documentation team's time of arrival and departure. Initial notes about the incident should answer the who, what, where, when, why and how questions. Describe the scene as it appears. Record transient details such as smells, sounds, sights and conditions such as the temperature and weather.

**Any rescue activity must be recorded.** For example, large collapsed buildings may generate 'rescue activity' if persons are believed to be buried in the rubble. All of this should be recorded. Bodies recovered should be photographed as found. After the deceased are removed, the area the body was in should also be photographed. Signs of activity should also be noted.

Detailing the activities undertaken by the documentation team at the crime scene may prove vital in establishing whether the crime scene was tampered with.<sup>1655</sup> All personnel assigned to the

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<sup>1655</sup> Groome Handbook, p. 86.

documentation of the crime scene must maintain notes and logs of their individual activities. It is vital to maintain a permanent record of all crime scene activities.

#### 5.3.1.7 Step Seven: Comprehensive Collection of Information Evidence

At any time, if a piece of information cannot be collected due to concerns as to how it should be properly handled, practitioners must make a note of this, including the location and details of the provider, and photograph the information. This will allow the information to be collected at a later date.

Documentation teams should work to ensure a focused and comprehensive evidence collection procedure is followed. For each individual crime scene, the team lead should identify which type of search methodology is most appropriate. There are four types of search methodology that can be considered:

<b>Lane or strip search</b>	Searchers walk in parallel along defined lines in the same direction.
<b>Grid search</b>	A grid search is conducted by completing a lane search in one direction then in a perpendicular direction. While it takes longer than a lane search, it has the benefit of providing a more thorough search of the area.
<b>Zone search</b>	This involves dividing the area into adjacent zones. The smaller the size of the zone, the more methodical the search can be. There can be multiple searchers per zone.
<b>Spiral search</b>	This involves searching in a spiral form either starting centrally and spiralling outwards, or from out to in. The problem with the former is that information may be destroyed as the searcher moves to the centre of the crime scene to begin their search.

Table 82: Search Methods for Collecting Information from a Crime Scene

It is essential that the team lead oversees all information collection. The team lead should select a systematic search pattern for information collection based on the size and location of the scene. **They should be mindful of any specialised crime-scene circumstances which may require a unique approach.** For example, if the documentation process is conducted in a custodial facility, the search methodology should be appropriate for the size and layout of that particular scene. In such situations, practitioners should consider that information could exist at higher levels than in a typical crime scene, and that some evidence may have been deliberately covered up. Layers of material should be moved to uncover any evidence that may have been hidden underneath. In cells in a detention facility, practitioners should be sure to move aside bedding material and frames, lamps, air grates, cell bar attachments and trash receptacles.

**Transient information** should be the initial focus of the documentation process. This includes the information that is most susceptible to environmental degradation. In general, the documentation process should move from the least intrusive collection methods to the most intrusive. Environmental factors should be continually assessed, and the plan reformulated when necessary to avoid degradation.

As a general rule, defer the collection of forensic information (i.e., DNA, blood, semen, body parts, etc.) to trained specialists, such as forensics experts. Wherever possible, blood-stained items should



be collected and stored in their entirety, i.e., practitioners should collect the entire garment rather than cutting out the stained section. Such items must be carefully handled to avoid contamination and, if collected by the practitioners, stored in a plastic bag.

Similarly, collection of potentially dangerous information, such as firearms or other weaponry and associated material (such as cartridges, casings and bullets) should be left to professionally trained practitioners if possible.<sup>1656</sup> Accelerants and ignitable liquids should also be collected by specialised experts. All practitioners should be mindful of indicators of the presence of such substances via their smell, sight and sound. They should be recorded in notes and practitioners should never attempt to handle such information before consulting an expert.

When collecting other types of physical information from a crime scene, practitioners must:<sup>1657</sup>

- Prioritise collecting information which may disappear/deteriorate if not collected immediately.
- Wear protective clothing (e.g., gloves) before collecting the item to avoid contamination.
- Photograph the information in its original location before removing it.
- Obtain standard/reference samples from the scene.
- Immediately secure electronically recorded evidence (e.g., surveillance cameras and computers) from the vicinity of the scene (*see* Section 5.5.1.2).
- Document the condition of firearms/weapons prior to rendering them safe for transportation and submission.
- Record the description and the original position of the information in sketches and notes.
- Record, handle and store information to maintain its chain of custody (*see* Section 4.2.2).
- If possible, consult experts to assist with the collection of physical information which requires specialist knowledge (such as gunpowder, DNA or bodily fluids) to prevent degradation or contamination.

#### **5.3.1.8 Step Eight: Complete the Collection of Evidence and De-brief**

**When the documentation of the crime scene is complete, the team lead must establish a crime scene debriefing team comprised of all information collectors, along with the most relevant experts.**

The purpose of this debriefing is to:

- Determine what information was collected;
- Discuss preliminary scene findings with team members;
- Discuss potential technical forensic testing to be performed;
- Initiate any action identified in discussion that may be required to complete the documentation of the crime scene;

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<sup>1656</sup> PILPG Handbook, p. 95-96.

<sup>1657</sup> IICI Investigators Manual, p. 263-269.

- Brief the person(s) in charge upon completion of an assigned crime scene task; and
- Consider post-scene responsibilities for law enforcement personnel and other responders.

The team lead should then conduct a final survey of the crime scene to ensure all information has been collected and the scene has been processed fully. To this end, the team lead should conduct a final walk-through. The final survey should ensure the following:

- Each area identified as part of the crime scene is visually inspected;
- All information collected at the scene is accounted for;
- All equipment and materials generated by the documentation process are removed;
- Any dangerous materials or conditions are reported and addressed; and
- Photographs are taken depicting the condition of the scene at exit.

The crime scene should then be handed back to the local population.

As discussed below, when the documentation process is complete, the team lead should ensure that all records of the documentation process pertaining to the crime scene is recorded in the Documentation Folder (*see* Section 4.1.2), and that all physical information is stored according to best practice including by maintaining a chain of custody (*see* Section 4.2.2).

### **5.3.2 Receiving Physical Information from a Source**

When receiving physical information from a source (i.e., a victim, witness or third party), practitioners should:<sup>1658</sup>

- Avoid receiving information in exchange for money.
- Ensure that the source obtained the information through ‘valid means’. In short, this means information must be obtained honestly, without threat, coercion or trickery and with due regard to the fair treatment of others, especially the vulnerable (*see* Section 5.2, above).<sup>1659</sup>
- Consider the motivation of the creator/source in creating/providing the documentary item.
- Record the personal and contact details of the source.
- Wear protective clothing (i.e., gloves) when handling the item in order to ensure that any forensic information on the item is not contaminated.
- Avoid altering the original state of the information in any way (e.g., by stapling a document, or washing a piece of clothing).
- Never promise the source that the information or their identity will remain confidential in all circumstances.

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<sup>1658</sup> Nystedt et al., *Handbook*, p. 56; The Engine Room et al., ‘Dat Nav: How to Navigate Digital Data for Human rights Research’ (June 2016) (‘Dat Nav: How to Navigate Digital Data for Human rights Research’), p. 24; IICI Investigators Manual, p. 237.

<sup>1659</sup> ‘Valid means’ is described in Article 69(7) of the Rome Statute, which specifically provides that information obtained by means of a violation of the Statute or internationally recognised human rights shall not be admissible if: (i) the violation casts substantial doubt on the reliability of the information or; (ii) the admission of the information would be antithetical to, and would seriously damage the integrity of, the proceedings. *See also*, CPC, Article 87.

- Explain to the source that the authorities who receive the information may be able to address any confidentiality and/or security concerns through the implementation of protective measures (*see* Section 6.1.4).
- Make copies of the original information (e.g., photograph the physical information or scan a document) as soon as practicable and store the original appropriately to prevent loss or damage (*see* below). Avoid making too many copies of the original document.<sup>1660</sup>

### 5.3.3 **Recording, Handling and Storing Physical Information**

All physical information should be properly recorded, handled and stored to ensure its reliability and, consequently, its successful admission as evidence before a court. If followed, the guidance below will ensure that practitioners maintain an accurate and complete chain of custody (*see* Section 4.2.2) of the item in question and ensure that it is stored and preserved in a safe environment.

#### 5.3.3.1 ***Recording Physical Information***

When physical information is collected or received by the practitioner (whether during a crime scene inspection or from a source), **the practitioner should ensure that all documentation activities and other documentation pertaining to the crime scene is recorded in the Documentation Folder** (*see* Section 4.1.2). The section of the Documentation Folder on physical information should include:<sup>1661</sup>

- A Physical Information Log to register the collection of physical information from the crime scene, indicating:
  - The reference number of the object assigned by the practitioner;
  - A description of the object;
  - When, where and by whom the object was collected (including their personal and contact information);
  - If the object was provided by a person, when, where and by whom it was provided (including their personal and contact information); and
  - Any additional comments regarding the circumstances under which the information was collected/provided.
- Photographs of the collected information.

In addition, if a crime scene has been inspected, the Documentation Folder should include the following:

- The overall military narrative that puts the crime scene into its proper historical context;
- Any videos/photographs, maps, or sketches which have been created of the crime scene or physical information;
- Military documentation forms regarding the initial securing of the crime scene;
- Entry/exit documentation; and
- All photographs and videos taken for the purpose of mapping the crime scene.

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<sup>1660</sup> *See e.g.*, IICI Investigators Manual, p. 237.

<sup>1661</sup> IICI Investigators Manual, p. 263.

### 5.3.3.2 *Handling Physical Information*

In order to maintain the chain of custody (*see* Section 4.2.2), **as few people as practicable should handle the information**. If a link in the chain of custody is missing or in question, a court may need to assess whether it has been intentionally or inadvertently altered from its original state, which may affect its admissibility or the reliability and weight given to it by the judges.

#### 5.3.3.2.1 *Packaging (Labelling) and Marking Evidentiary Items*

Information must be packaged, labelled and sealed. The packaging method must ensure that the item cannot be altered or substituted without distorting the integrity of the package, and that it is adequately protected from damage, spoilage, deterioration or loss of its properties. For example, a piece of physical information may be packaged in a plastic or paper storage bag or envelope. Seal the bag/envelope with adhesive tape in a way that enables any interference to be detected. Biological matter, e.g., items containing bodily fluids such as bloodstains or semen) should be stored in a plastic bag.

If the piece of physical information is too voluminous to be packaged or there are other reasons that preclude practitioners from packaging the item, a label must be attached which can be removed or changed.

Once the information is packaged, it should be labelled with the following information to ensure its future identification and to maintain the chain of custody. This should include:<sup>1662</sup>

- The reference number assigned to the object upon collection;
- The name of the person who originally collected the item, the date and time it was collected and the location where it was found;
- A description of the object (appearance, quantity, size, weight, etc.); and
- The names of all persons who have had possession of the item, the date, time and location of handlings, and the purpose for which they handled it.

Consider whether the marking of the package needs to be supplemented by any other details to distinguish each item from similar collected items. For example, if the information is part of a set or collection (e.g., multiple photographs of a crime scene), make sure that each item is marked and identified as part of a set and bind it with a note stating which items comprise the full set.<sup>1663</sup>

#### 5.3.3.3 *Maintaining a Safe and Secure Storage System*

Once the practitioner has completed the necessary steps regarding the collection and handling of the physical item, it must be stored. Accordingly, practitioners should:<sup>1664</sup>

1. **Store the information in a secure, safe place**, such as a room or a closet space with a lock, free from environmental factors (extreme heat or cold, water, etc.) and unauthorised access;

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<sup>1662</sup> PILPG Handbook, pp. 36, 94.

<sup>1663</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 205.

<sup>1664</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 205.

2. **Appoint a person to be responsible** for the storage area and control who gains access to the physical items;
3. Institute a logbook to record who enters the room and for what purpose;
4. Ensure that any handling of the item after storage is properly recorded; and
5. Contact the authorities to pass the item(s) to professional investigators as soon as practicable.

See also Section 4.2 for more information on how to implement a storage system.

## **5.4 COLLECTING, HANDLING AND PRESERVING DOCUMENTARY INFORMATION**

Documentary information from private and public sources may be vital for establishing the elements of a particular international crime and linking perpetrators to crimes. Accordingly, practitioners must ensure that documentary information is properly collected, handled and preserved to ensure its admissibility before domestic and international courts. This section will consider the collection, authentication, recording and storing of documentary information.

### **5.4.1 Collection and Receipt of Documentary Information**

Practitioners will generally come into possession of documentary information in two ways: (i) collecting it from a crime scene; or (ii) receiving it from a source, such as a witness or victim. Physical documents can be collected, handled and stored by practitioners in the same manner as other physical information. See Section 5.3 for further details.

### **5.4.2 Authenticating Documentary Information**

One of the most important issues regarding documentary information is authenticity, which is intrinsically linked to the eventual assessment of its reliability and probative value during admissibility assessments (see Section 5.2). A document's authenticity must be established for it to be admitted as evidence before a court.<sup>1665</sup>

The following section will elaborate on the ways in which different types of documentary information can be authenticated according to international standards.

#### **5.4.2.1 Authentication**

A given document may be: **self-authenticating**, for instance, an official document that is publicly available from an official source; **prima facie reliable**, meaning it bears sufficient indicia of reliability such as a logo, letterhead, signature, date or stamp and appears to have been produced in the ordinary course of the activities of the person or organisation that created it; or **lacking sufficient indicia of reliability**, meaning that its authenticity must be established to enable the court to verify that the document is what it purports to be.

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<sup>1665</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, paras 22-23; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials, 30 October 2007, para. 6; *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, Decision on Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para 7.

If a document is not self-authenticating or *prima facie* reliable, practitioners should take the following steps to assess whether the document is authentic, as soon as possible upon receipt of a document(s):<sup>1666</sup>

- Identify the author and source of the document (including the organisation they belong to) and their motivation for producing/providing the document;
- Establish when, where and for what purpose the document was produced;
- Identify witnesses, ideally the author of the document, who can speak to its creation or origins;
- Establish the provenance (i.e., the origins and source) of the information relied upon by the author in the preparation of the document;
- Find (if possible) copies of the document from different sources and cross-check its content;
- Record how the document was obtained (i.e., was it obtained through valid means (*see* Section 5.3.2));
- Record and maintain a chain of custody (*see* Section 4.2.2) for the document from the time of its creation until it is provided to domestic or international authorities; and
- Collect additional information to demonstrate the document's authenticity (*see* Section 5.2).

#### 5.4.2.2 *Specific Guidance on How to Authenticate Particular Types of Information and Determine Their Overall Probative Value*

Type of Information	Description	Necessary steps to ensure authentication
<b>Reports from NGOs, inter-governmental organisations ('IGOs') or third State governments</b>	Generally, reports that appear to be well-researched from well-known and respected NGOs, IGOs or governmental bodies will be considered <i>prima facie</i> reliable (i.e., they do not require authentication) if they provide sufficient guarantees of non-partisanship and impartiality. <sup>1667</sup> Practitioners should focus on collecting reports issued by impartial, independent and respected NGOs, IGOs or governmental bodies (such as Human Rights Watch, Amnesty International, the United Nations ('UN'), including the Human Rights Monitoring	<ul style="list-style-type: none"> <li>• Note when and from where the document was obtained.</li> <li>• Assess whether the document provides information on its sources.</li> <li>• Consider the methodology used to analyse and present the factual claims within the report.</li> </ul>

<sup>1666</sup> *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-424, Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 29 November 2013, para. 9; *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 237; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Trial Judgment, 14 March 2012, para. 109; 'Investigation Manual for War Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina' (Organization for Security and Co-operation in Europe ('OSCE') 2013), p. 65.

<sup>1667</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, paras 29-30; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", 27 June 2013, para. 21.



	Mission in Ukraine ('HRMMU') and the Independent International Commission of Inquiry on Ukraine).	
<b>Official Documents</b>	Official documents refer to any authenticated documents from organisations performing public functions (even if they do not belong to regular State authorities) and may include documents such as pay records, records of employment, orders, police reports, meeting reports, court records, military personnel records, daily military reports, land and property reports or State legislation. <sup>1668</sup> Generally, these types of documents constitute highly probative information before a court.	<ul style="list-style-type: none"> <li>• Note when, from where and how the document was obtained.</li> <li>• Check whether the document is authorised and signed by an identified representative or agent of an official body or organisation. If so, the document will be presumed authentic, as long as the authenticity of that signature is not called into question.</li> <li>• If there is no identified author, check whether the document is self-authenticating, i.e., whether the origin of the document is apparent from the document itself (for instance from a letterhead or logo).</li> <li>• In case the document is not self-authenticating (i.e., does not bear a clear indication as to its origin and author), ensure the document is certified by the relevant issuing authority or an identified representative from that authority.</li> </ul>
<b>Private Documents</b>	Private documents are those provided by private individuals or organisations.	<ul style="list-style-type: none"> <li>• Note when and from where the document was obtained.</li> <li>• Ensure that the document provides proof of authorship or possesses other indicia of reliability proving its authenticity, e.g., a signature, stamp, watermark, date, self-evident meaning or indication of distribution, and whether it is properly structured and formatted.</li> <li>• If the document does not provide any indicia of reliability, have the author authenticate it or find corroborating information to authenticate it and establish its date (e.g., through another document or witness referring to it).</li> </ul>
<b>Media Articles/ Reports</b>	Media articles and press reports may provide highly relevant information on the occurrence of crimes, statements made by alleged perpetrators or associated groups, or details on the scope of the damage	<ul style="list-style-type: none"> <li>• Note the date and source of the press article/ report and how it was retrieved.</li> <li>• Note the author of the article/opinion and how they have come to their conclusions, e.g., the background of the</li> </ul>

<sup>1668</sup> *Katanga Decision on the Prosecutor's Bar Table Motions*, para. 24; N Nystedt et al., *Handbook*, p. 62; IICI Investigators Manual, pp. 325-326.

	caused to victims or affected communities. However, media articles/reports often do not provide detailed information about their sources and, thus, will likely be considered an unreliable opinion. <sup>1669</sup> This information is often only admissible when presented in court by an expert. <sup>1670</sup>	journalist(s) and their sources and other material relied upon in publishing the article/report.
<b>Letters, Manifestos, Political Statements and Similar Documents</b>	Letters, manifestos, political statements and other documents emanating from persons or entities involved in contemporaneous events related to the commission of crimes will likely be considered as opinion information and will therefore often only be admissible when presented in court by an expert. <sup>1671</sup> More often than not, these documents will merely contain assertions by people with subjective interests, limiting their probative value. <sup>1672</sup> If, however, the documents make factual assertions about relevant military or political events, practitioners should take steps to authenticate. <sup>1673</sup>	<ul style="list-style-type: none"> <li>• Note when, from where and how the document was obtained.</li> <li>• Note the date of the document.</li> <li>• Find corroborating information (allowing cross-checking) demonstrating that the document contains reliable and objective statements.</li> <li>• Ask the author for further information concerning how they arrived at the conclusions or opinions contained in the document.</li> </ul>

### 5.4.3 Recording Documentary Information

Similar to physical information, documentation activities related to the collection of documentary information must be recorded in the Documentation Folder (*see* Section 4.1.2, above) reflecting (a summary of) the document's content, origin and other relevant information.

### 5.4.4 Storing Documentary Information

Once practitioners have completed the previous steps, the original version of the document needs to be preserved. The process of storing documentary information and maintaining its chain of custody in the Documentation Folder are identical to the rules related to physical information (*see* Section 5.3, above).

However, the following additional requirements apply to documents specifically:

- The documents must be stored in a condition suitable for their further use in criminal proceedings (if passed on to the relevant authorities), i.e., in a secure, safe place that

<sup>1669</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, paras 31-33; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Defence Request for Admission of Evidence from the Bar Table, 31 January 2018, para. 45.

<sup>1670</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, para. 31.

<sup>1671</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, para. 32.

<sup>1672</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, para. 32.

<sup>1673</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, paras 32-33; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Prosecution's request for admission of documentary evidence, 28 March 2017, paras 27-28.

preserves their essential features and properties and precludes conditions that may lead to their destruction or damage. The storage of documents must be free from environmental factors (e.g., extreme heat or cold, water, etc.) and unauthorised access.<sup>1674</sup>

- All documents should be labelled with an established numbering system. Where relevant, the number of an item should include a link/reference to the connected piece of evidence. For example, documents referred to in a witness statement should be clearly marked as such.
- Documents must be stored together with the Documentation Folder (*see* Section 4.1.2) in the individual safe (metal cabinet). Within the Folder, documentary information should be catalogued in chronological order. Documentary information that also forms physical information and, due to its properties (dimensions, quantity, weight, volume), cannot be stored together with the Documentation Folder must be stored in a special premise equipped with safes (metal cabinets), racks, metal upholstered doors, bars on the windows, security and fire alarms, etc.
- When the document is stored with the Folder, it must be kept enclosed between blank sheets of paper in envelopes. It is forbidden to make any notes or inscriptions on such documents, or to bend them. If there is a large number of documents, they are to be compiled into a separate package. The envelope (package) should indicate the list of documents attached to it.

*See also* Sections 4.2 and 5.3.3.3 for more information on how to implement a storage system and handle evidentiary material.

## **5.5 COLLECTING, HANDLING AND PRESERVING DIGITAL OR AUDIO-VISUAL INFORMATION**

Digital information can play a crucial role in the documentation of international crimes.

Digital or electronic materials can fall under two broad categories depending on their nature:

<b>Open-source intelligence (‘OSINT’) and social intelligence (‘SOCINT’) information</b>	<b>Other digital information stored on, received or transmitted by an electronic device</b>
Open-source information on the internet that any member of the public can obtain by request, purchase or observation.	Audio-visual content that would not otherwise be classified as open-source information (e.g., photos or videos of the crime scene created by the practitioner).

*Table 83: Types of Digital or Electronic Materials*

The present section will consider the general rules for collecting, handling and preserving digital information while Section 5.6 will provide specific guidance on OSINT/SOCINT information. Accordingly, this section will first address three possible scenarios of collecting digital information, namely digital information from: (i) photos and videos; (ii) an electronic device (‘e-device’); and (iii) third parties. It will further discuss the general principles of handling and preserving digital

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<sup>1674</sup> PILPG Handbook, p. 66.

information, which should be applied whenever handling or preserving digital information, whether the information originates in digital form or is a digitalised version of physical information.

### **5.5.1 Collecting or Creating Digital Information**

Digital information can be collected or created in a variety of ways, including: photographic or video information created by the practitioner (e.g., by filming a crime scene); information collected from an e-device (e.g., phone, laptop or camera) discovered at the crime scene, or belonging to a deceased victim or an alleged suspect; or information received from third parties (e.g., witnesses). Each of these will be discussed in turn below.

#### ***5.5.1.1 Creating Photographic and Video Information***

A practitioner may create photographs and/or videos of crime scenes, investigation sites or physical information. Before being admitted as evidence, a court will require proof of the photograph or video's originality and integrity.<sup>1675</sup> The relevance of the photograph or video depends on the date and/or location of the recording, so the practitioner must ensure that this information is always provided.<sup>1676</sup> Taking photographs or videos during documentation activities should follow the set of rules described below, many of which are described on specialised platforms such as [Witness.org](https://witness.org).<sup>1677</sup>

Before taking either a video or a photo, the following preliminary preparations should be made:

- Determine which images to film/photograph by asking what crime was committed, who committed the crime and how;<sup>1678</sup>
- Prepare a basic plan as to what information was already collected and what footage is still needed;<sup>1679</sup>
- Be prepared to chronologically document operations with digital information on the ground;<sup>1680</sup>
- Ensure personal security: it is recommended not to film a crime or a crime scene if it is too unsafe (*see* Section 5.3.1.3);<sup>1681</sup> and
- When the crime scene is secured, plan how exactly it will be filmed/photographed.<sup>1682</sup>

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<sup>1675</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, para. 24(d).

<sup>1676</sup> *Katanga* Decision on the Prosecutor's Bar Table Motions, para. 24.

<sup>1677</sup> *See e.g.*, resources on video as evidence available in Ukrainian: Witness, Video as Evidence Field Guide.

<sup>1678</sup> Witness, Video as Evidence Field Guide, pp. 60-62.

<sup>1679</sup> Witness, Video as Evidence Field Guide, p. 84.

<sup>1680</sup> State Standards of Ukraine No. ISO/IEC 27037:2017 'Information technology. Methods of protection. Guidelines for Identifying, Collecting, Obtaining and Preserving Digital Evidence' in Ministry of Internal Affairs of Ukraine, National Academy of Internal Affairs, 'Use Of Electronic (Digital) Evidence in Criminal Proceedings. Guidelines' (2<sup>nd</sup> edn, 2020) ('State Standards of Ukraine on Identifying, Collecting, Obtaining and Preserving Digital Evidence'), pp. 79-80.

<sup>1681</sup> Witness, Video as Evidence Field Guide, p. 59.

<sup>1682</sup> Witness, Video as Evidence Field Guide, p. 91.

#### 5.5.1.1.1 *Taking a Video*

If a documentation team is collecting video information, ensure that the person taking the footage has experience in doing so. Practitioners should take care to:<sup>1683</sup>

- Record the time, date and location:
  - If possible, ensure that the location is clearly visible in the video itself and/or activate GPS;
  - Ensure the camera or cell phone is set to the correct date and time; or
  - Record your voice saying the date, time and location, write them on a piece of paper and record it for 10 seconds or film anything that shows this information, e.g., a clock, the front page of a newspaper, a street sign or landmarks, other geographic features, etc.
- Take the video immediately, i.e., before the crime scene or information is disturbed.
- Prioritise quality over quantity.
- Film strategically and logically to ensure that viewers will understand what happened and where:
  - Avoid narration and film silently (apart from voicing the date, time and location if needed);
  - Continuously film the same incident or location, i.e., try not to stop and start the video unnecessarily to avoid any suggestion that the video has been spliced or otherwise altered. If this is impossible, start and stop the recording overlapping the shots (ending the footage and starting a new one from the same shot);
  - Ensure that the video captures all aspects of the scene, not just what you think is important;
  - Record details that demonstrate the location (e.g., buildings, landmarks, etc.), the time of day, date and surroundings, as well as the details being filmed (i.e., the specific incident occurring or the physical information);
  - Hold all your shots for 10+ seconds;
  - Move the camera slowly when changing your position or when zooming in or out;
  - Avoid fast or jerky movements;
  - When possible, use a tripod, monopod or even a surface to stabilise the camera; and
  - Try to create the following types of footage:<sup>1684</sup>

#### **360-degree view**

Film 360 degrees around, from a distance and up close, showing what is happening at the crime scene. In particular, pick a starting point at one corner or side of the crime scene. If possible, pick a starting location that is a cardinal direction (e.g., north). If it is safe to include your voice, state your starting location on camera (e.g., north corner, south side). Continue to record and slowly – aim for 15 seconds or more – turn completely around in a circle from the spot where you are standing, recording a 360-degree view of the scene.

<sup>1683</sup> PILPG Handbook, pp. 75-79; Witness, *Video as Evidence Field Guide*, pp. 62-65, 86, 91-93.

<sup>1684</sup> For a detailed description of useful advice and illustrations, consult: Witness, *Video as Evidence Field Guide*, pp. 91-97.

<b>Wide shots</b>	From the starting position, hold your first wide shot for 10 seconds. Then, move slowly clockwise, stopping at each corner or side of the scene, and hold a wide shot for 10 seconds until you have completed the circle (after this shot and throughout the following shots keep the video recording if possible).
<b>Medium shots</b>	Medium shots are useful to establish the location of the information in the crime scene and the relationship between evidentiary pieces. From your original start location, move in closer to the centre of the scene. Hold your first medium shot for 10 seconds. Then, while recording, move slowly clockwise, stopping at each corner or side of the scene to hold a medium shot for 10 seconds until you have completed the circle.
<b>Close-up shots</b>	Close-up shots show key details and identify people at the scene. From your original start location, moving clockwise and in a spiral, focus in on the first piece of information. Hold a focused close-up shot for 10 seconds. If possible, take a 10-second shot of the same piece of information with something that shows scale (e.g., a cell phone or a ruler). Then, as you continue moving clockwise and in the spiral pattern, take a close-up shot of any details that may be significant, held for 10 seconds both with and without something that shows scale.

- If you were unable to add basic information to the video recording, create a separate document summarising the key information about the footage.
- Record the contact details of the person who is filming.
- Keep memory cards safe from physical damage or confiscation.
- Do not attempt to alter the video (e.g., cut/edit, or add anything to the original). If an alteration is necessary, record the reason why.<sup>1685</sup>
- Practitioners may seek corroborative information on video from witnesses at the crime scene who may be able to clarify the context and relevant occurrence.<sup>1686</sup> In doing so:<sup>1687</sup>
  - Obtain the **informed consent** (see Section 6.2) of the person you are recording; and
  - Record the names and contact information of the person you are recording and others on the scene who may have information about the events.
- Lastly, be aware of digital tools that allow photos and videos to be verified during their creation:<sup>1688</sup>
  - E.g., the eyeWitness system, which includes: (i) a mobile camera app designed to **verify the date, time and location** of video footage, and the fact that the footage has not been altered; (ii) a secure server system and transmission protocols that create a **chain of custody** that can be presented in court; and (iii) tailored support for the use of photo and video in court and other accountability processes.<sup>1689</sup>

<sup>1685</sup> Witness, Video as Evidence Field Guide, pp. 57-68, 96-97; PILPG Handbook, pp. 67-70; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 194-195.

<sup>1686</sup> Witness, Video as Evidence Field Guide, pp. 57-68, 96-97; PILPG Handbook, pp. 67-70; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 194-195.

<sup>1687</sup> PILPG Handbook, pp. 76; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 194-195.

<sup>1688</sup> PILPG Handbook, pp. 73-75.

<sup>1689</sup> For more information, get in touch with: [general@eyewitness.global](mailto:general@eyewitness.global) or visit: <https://www.eyewitness.global/>.



#### 5.5.1.1.2 *Taking a Photograph*

Photographs provide an effective way to document a crime scene in its original condition, as well as close-up coverage of notable parts of the scene.<sup>1690</sup> When taking a photograph while documenting a crime scene, the above-mentioned guidance in relation to video footage should be applied as far as is practical. Additionally, the following advice specifically relates to the taking of photographs:<sup>1691</sup>

- Use the camera's date and time capabilities or show the date/time by using, e.g., a newspaper.
- Activate GPS settings on the device, or ensure the location is clearly visible in the photograph.
- Transient objects, such as bloodstains or latent prints, should be photographed as soon as possible.
- Take a series of photographs to ensure you have good quality images and from different angles. At the same time, remember that quality takes priority over quantity.
- Photographs should move from the exterior to the interior of the crime scene, and from general to specific focus.
- Take close-up and mid-range photographs of the individual pieces of information.
- Take wide-angled photographs that show the location of the information within the context of the entire scene.
- Use a ruler next to relevant objects to indicate their dimensions.
- Record the author, location, date and time of the particular photograph; a description of the part of the crime scene the photograph depicts (e.g., "investigative scene facing north") and a description of the information the photograph shows, if any (e.g., "bullet casings found at the south entrance to the crime scene").
- Take photographs of victims and potential perpetrators that may still be at the crime scene (provided that all **security and consent issues** have been adequately addressed).
- Do not attempt to alter the photograph (e.g., crop/filter or add anything to the original). If an alteration is necessary, record the reason why.

In addition to the above, the following specific rules apply to photographing recovered bodies:

- Bodies recovered should be photographed as found.
- Photographs should be taken from all angles, showing a facial view, and the position of the hands and feet where possible without altering the body, the clothing or its position.
- Wound photography should be conducted at close range using oblique lighting.
- Photographs should be taken while moving around the body from an overhead perspective (standing position) and from the same level as the body if the body is lying on the ground.
- After the deceased is removed, the area the body was in should be photographed, noting any signs of activity.

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<sup>1690</sup> Groome Handbook, p. 90.

<sup>1691</sup> Groome Handbook, pp. 89-92; PILPG, 'Field Guide for Civil Society Documentation of Serious Human Rights Violations' (2016), p. 20; PILPG Handbook, pp. 75-79; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 194-195. *See also*, *Katanga* Decision on the Prosecutor's Bar Table Motions, para. 24(d).

Once the photograph or video has been taken, it should be **treated as other forms of documentary information** (see Section 5.4).

#### **5.5.1.2 Collecting Digital Information from an E-device**

Digital information can also be collected directly from an e-device, such as a computer, digital camera, mobile phone or portable electronic storage device. Such a device can be discovered at the crime scene, belong to a deceased victim or be seized from an alleged perpetrator. E-devices must be handled carefully in order to protect not only their physical integrity but also the data they contain. The integrity of a device may be compromised and data (including date, time and system configurations) lost due to among other things, exposure to electromagnetic fields, environmental factors like dampness, dust and humidity, and failure or corruption of the battery.<sup>1692</sup> Most batteries have a limited life and there is a real risk of losing data from the prolonged storage of e-devices. Therefore, practitioners should give priority to e-devices powered by batteries, and all relevant data should be recorded in a log as soon as possible. Additionally, practitioners should consider the following issues when collecting digital information from e-devices:<sup>1693</sup>

- What type of collection/retrieval methods will be used?
- What equipment may be needed on site?
- What is the level of instability of data and information related to potential digital information?
- Is remote access to any digital device possible, and does it threaten the integrity of the information?
- What happens if the data/equipment is damaged?
- Can the data be compromised?
- Can the digital device be configured to destroy, damage or confuse the data if turned off?

The information contained on the device should be reflected in the Documentation Folder in a suitable form, e.g., electronic means, photograph or video recording of the screen or in paper form (see Section 4.1.2).

##### **5.5.1.2.1 How to Search E-Devices**

With the large file-containing capabilities of modern e-devices, it is key that practitioners know how to efficiently search these devices to save time and adhere to data minimisation principles (which dictates that the information collected must be no more than required). Ideally, when an e-device is found, it should be handled and examined by a digital forensic expert to avoid accidental contamination of data and to protect the digital information on the device from, e.g., attempts to

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<sup>1692</sup> US Bureau of Justice Assistance, 'Crime Scene Investigation: A Guide for Law Enforcement' (September 2013), p. 115-116.

<sup>1693</sup> State Standards of Ukraine on Identifying, Collecting, Obtaining and Preserving Digital Evidence, p. 81.

tamper with the information via remote access programs.<sup>1694</sup> See Section 5.5.2.2, below, for more information.

The following are examples of techniques that may be utilised in order to identify, extract and collect information that is pertinent to the documentation of international crimes from e-devices:<sup>1695</sup>

<b>Keyword Searches</b>	Searching the content of devices using likely or known file names and/or key phrases of text, which allows for searches of specific, topical information and digital documents.
<b>File Signature Searches</b>	Searching the device for specific types of electronic files, e.g., doc, PDF, JPEG, etc.
<b>Searching Known Evidential Locations</b>	Focusing on electronic files and folders that are most likely to contain the relevant information. E.g., folders whose name corresponds to an issue being documented, or folders that were most recently accessed prior to seizure of the device.
<b>Hash Searches</b>	Hashes are a unique string (text data) used to identify a file and ensure it has not been tampered with since its seizure. In order to search for a file using hashes, practitioners must be familiar with the ‘command’ function of a computer device.

Table 84: Techniques for Identifying and Extracting Information from E-devices

### 5.5.1.3 Collecting Digital Information from Third Parties

When collecting digital information from third parties, keep in mind the following considerations:<sup>1696</sup>

- Avoid receiving information in exchange for money;
- Check that the provider obtained the information through valid means (*see* Section 5.3.2); and
- Consider if witnesses can provide information to verify the digital information received, e.g., by describing what is in the photograph/video, when, where and why the photograph/video was taken and by whom, and by providing context.

## 5.5.2 General Requirements for Handling and Preserving Digital Information

The mishandling of digital information can lead to unintentional modification or destruction of information that reduces its probative value or otherwise renders it inadmissible in court. Therefore, all devices collected, and potential digital information obtained, should be protected, as far as possible, from loss, destruction or damage.<sup>1697</sup> To protect digital information, practitioners should keep in mind the following basic steps related to chain of custody and preservation of digital information.

<sup>1694</sup> Council of Europe (‘CoE’), ‘Electronic Evidence Guide: A Basic Guide for Police Officers, Prosecutors and Judges’ (Cybercrime Division Directorate General of Human Rights and Rule of Law, 15 December 2014) (‘CoE Electronic Evidence Guide’), pp. 11, 47-49, 56-57.

<sup>1695</sup> These examples are based on a list drawn up by the European Union Agency for Network and Information Security (‘ENISA’). *See*, ENISA, ‘Electronic Evidence – A Basic Guide for First Responders’ (2014) (‘ENISA Basic Guide for First Responders’), pp. 17-18.

<sup>1696</sup> Dat Nav: How to Navigate Digital Data for Human rights Research, p. 24.

<sup>1697</sup> State Standards of Ukraine on Identifying, Collecting, Obtaining and Preserving Digital Evidence, p. 86.

### 5.5.2.1 Chain of Custody

As with physical and documentary information, a chain of custody requires practitioners to record a precise description of the item collected and keep a detailed record of the activities conducted in relation to that item in the Documentation Folder (*see* Section 4.1.2).<sup>1698</sup> A complete chain of custody should record:<sup>1699</sup>

- The whereabouts of the piece of digital information from the moment someone receives it to the moment it is handed over to the relevant court or other proper authority;
- All persons who handled that information, including those that provided the information and those responsible for the storage of that information;
- The purpose for which the information was handled; and
- Any alterations made to the digital information and the person responsible.

If digital information exists in a physical form (e.g., an e-device), the chain of custody will further be maintained by packaging and labelling the item and maintaining a record in the Physical Information Log (*see* Section 4.2.2). *See also* Section 5.5.3, below, for additional considerations to bear in mind when seeking to protect information through the maintenance of a chain of custody.

### 5.5.2.2 Preservation of Digital Information

Preservation of digital information refers to the storage of both the physical devices and data carriers, on which digital information is stored, as well as the preservation of information within a digital storage system. It entails organising and maintaining information in a secure place so it is easy to securely access, retrieve, interpret and understand for the entire time the information is required.<sup>1700</sup> The rules related to storing digital information differ depending on what type of information needs to be preserved: a physical device or data carrier (e.g., CDs, USBs, etc.); the digital information contained on such devices; or the information within the digital storage system in general. The following steps will assist in achieving these aims by preserving the integrity of e-devices and the digital information contained therein.

#### 5.5.2.2.1 Packaging and Storing Physical E-Devices

General rules related to packaging and storing physical devices and data carriers are the same as those applicable to physical information (*see* Section 5.3). In particular, after packaging, such items are stored within the Documentation Folder unless they are too voluminous and have to be stored in a specially equipped chamber. Additionally, practitioners should consider the following steps specific to e-devices:<sup>1701</sup>

- Packaging, transportation and storage conditions for e-devices must ensure protection from shock, vibration, altitude, heat (including heated seats), electromagnetic sources (e.g., police

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<sup>1698</sup> Nystedt et al., *Handbook*, pp. 56-57; Berkeley Protocol, para. 167.

<sup>1699</sup> PILPG Handbook, pp. 36-37; State Standards of Ukraine on Identifying, Collecting, Obtaining and Preserving Digital Evidence, pp. 80, 83.

<sup>1700</sup> PILPG Handbook, pp. 36-37.

<sup>1701</sup> Nystedt et al., *Handbook*, p. 57; State Standards of Ukraine on Identifying, Collecting, Obtaining and Preserving Digital Evidence, pp. 86-87; State Standards of Ukraine on Identifying, Collecting, Obtaining and Preserving Digital Evidence, p. 87.

radio, speakers, X-ray machines), radiation exposure, dust, oil, chemical contaminants, etc., as such conditions can potentially interfere with the device and corrupt the data contained therein.

- Extra precaution should be taken to not fold, bend or scratch media such as diskettes, CDs and tapes. Avoid placing adhesive labels directly on the surface of e-devices – label the outer cover so as to avoid damage from scratches, etc.
- Where a device is comprised of multiple parts and components, pack each individual component separately. For instance, separate the computer monitor from the attached wires.
- Clearly label and photograph each device and any associated parts or equipment. For instance, for a computer system, label the monitor, connections, cables, user manuals and any peripheral devices like scanners, printers, etc. Make note of any serial or identification numbers on these items.
- Leave cellular, mobile or smart phone(s) in the power state (on/off) in which they were found.
  - Challenges in dealing with powered on devices include: (i) isolating the device from cellular and Wi-Fi networks; and (ii) obtaining passwords for the device so the information can be examined forensically. Turning the device off could result in loss of information because there may be security features on the phone – such as passwords, security/wiping apps or biometrics (facial scan). Keep the device powered, unlocked (if locked, collect any available passwords or PIN codes) and in airplane mode until it is in the hands of an experienced technician.<sup>1702</sup>
- Devices with batteries should be checked regularly to ensure that they always have sufficient power.
- Digital information may also contain hidden information, fingerprints or biological information, so appropriate action should be taken to preserve this potential information.
- If possible, record the passwords, codes or PINs needed to access the device.
- A complete back up of the information should be kept in a separate location.<sup>1703</sup>

When preserving the digital information contained in the data carriers or devices themselves:

- Prevent unauthorised access to the data, including by limiting access to files to persons with security clearance and by maintaining strong passwords on all devices and information;<sup>1704</sup> and
- Encrypt files with particularly sensitive information with encryption software, such as [VeraCrypt](#).<sup>1705</sup> It is also recommended to install firewalls, antivirus and anti-spam software on all devices to protect from malicious software, such as MalwareBytes, Avira or AVG.<sup>1706</sup>

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<sup>1702</sup> USLEGAL, 'Digital Preservation Law and Legal Definition'.

<sup>1703</sup> ENISA Basic Guide for First Responders, pp. 6-7, 16-18,

<sup>1704</sup> PILPG Handbook, pp. 73-75, 121, 141; CoE Electronic Evidence Guide, pp. 47-49.

<sup>1705</sup> See e.g., Security-in-a-Box, 'Create and Maintain Strong Passwords' (11 November 2021).

<sup>1706</sup> See e.g., Security-in-a-Box, 'Protect Your Sensitive Information' (21 May 2021); Security-in-a-Box, 'Protect Against Malware' (17 June 2021).

For more information about digital security and data, see: Front Line Defenders and Tactical Technology Collective, [Security in-a-box – Digital Security Tools and Tactics](#).

### 5.5.3 Authenticating and Verifying Digital Information

Practitioners should work on the assumption that digital information will require **authentication and verification** before being used as evidence. This requires the ability to demonstrate that the digital information retains its **integrity**, particularly in establishing that the information has not been purposefully, or otherwise, manipulated or tampered with, and that the information is trustworthy and reliable.

#### 5.5.3.1 *Authenticating Digital Information*

Generally, digital information shared through official channels or marked with official logos or stamps may be considered **self-authenticating**, meaning that it does not require additional authentication.<sup>1707</sup> Practitioners should take steps to protect photographs or videos that may be doctored or otherwise used to disseminate misinformation. If the practitioner creates digital information or receives it from unofficial or unknown sources (e.g., photographs from a witness), they will need to take various steps to ensure the authenticity and integrity of the information. It is important that all those working with the created footage are able to prove the following:<sup>1708</sup>

<b>When</b>	Date and time of filming.
<b>Where</b>	Location and GPS coordinates (if possible) of the footage.
<b>What</b>	What is shown on/in the digital information.
<b>Who (if safe)</b>	The person who took the picture or created the digital information.

To assist in authenticating digital information, practitioners must adequately record the metadata<sup>1709</sup> of the digital information they have created. The metadata that practitioners should record in order to establish the authenticity of digital information includes:<sup>1710</sup>

- The description of the lifecycle of the digital information, i.e., the chain of custody;
- The details of any person/organisation that played a role in the creation of the digital information. Note that persons linked to the creation of the digital information should be available to testify in court on its integrity and related issues;
- How the digital information was created, collected or received;

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<sup>1707</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 8 October 2012, para. 9; L. Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2018) 41(2) *Fordham International Law Journal* 283 ('Freeman (2018)'), pp. 296-297.

<sup>1708</sup> Witness, 'Five pieces of advice on filming human rights violations in Ukraine'.

<sup>1709</sup> Metadata, or "data about data", is comparable to the content of catalogues and inventories in libraries and is used to verify the authenticity of digital information. It describes digital information through some of its basic characteristics such as its creator and the date and time of its creation. Metadata may be located outside or embedded in the resource it describes. A common method of creating metadata is by manually completing a form, either in writing or electronically, using pre-defined categories and vocabularies. See, PILPG Handbook, p. 70.

<sup>1710</sup> This list is drawn up on the basis of the Dublin Core Metadata Initiative ('DCMI'), used and recommended to human rights practitioners. See e.g., PILPG Handbook, pp. 71-72.



- The languages used in the digital content (if any);
- The type (e.g., a photograph, voice recording or video) and format (e.g., JPEG, MKV, mp3, etc.);
- The tool(s) used to create the digital content (e.g., the type of camera, recorder, etc.);
- The size or duration of the digital content;
- The subject of the digital content explained through single keywords (e.g., crime scene, attack, weapons, etc.) so the content can be retrieved quickly through keyword searches;
- A brief description of the content of the digital information; and
- The location the digital information depicts (if applicable), by geolocating the landmarks in the images either automatically (by enabling GPS on the e-device used) or manually (by, e.g., including street signs, clocks, landmarks, etc. in photographs and video footage).

Additionally, do not attempt to alter the photograph/video (e.g., crop/filter or add anything to the original) to ensure that it can be authenticated as originals. If an alteration is necessary, record the reason why.<sup>1711</sup>

#### 5.5.3.2 Verifying Digital Information

While authentication deals with ensuring that the digital information has not been manipulated or tampered with, **verification** purports to tell you something about the who, what, where and when of a certain event. Practitioners should verify digital information to increase its probative value in the event it is submitted as evidence to a court. To verify digital information that is not OSINT or SOCINT, the following cues can be used:

1. How did you get the information?
2. Who created the information?
3. Where is the content from?
4. When was the content created?
5. Why was the content created?

## 5.6 COLLECTING AND PRESERVING OSINT/SOCINT INFORMATION

The use of open-source information has come to the fore in recent years as an important part of the human rights investigator's toolkit.<sup>1712</sup> However, there is a prevalent idea that certain types of crime are less likely to be identified through open-source research methods because of their 'hidden' nature.

For example, in the context of conflict-related sexual violence ('CRSV'), it has been convincingly argued that open-source information of such crimes may exist but is "hiding in plain sight".<sup>1713</sup> Because practitioners do not expect to find information on these crimes, they may overlook it, or

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<sup>1711</sup> PILPG Handbook, pp. 69-70.

<sup>1712</sup> D. Murray et al., 'Mapping the Use of Open Source Research in UN Human Rights Investigations' (2022) *Journal of Human Rights Practice* (Murray et al. (2022)), p. 1.

<sup>1713</sup> A. Koenig and U. Egan, 'Hiding in Plain Site: Using Online Open Source Information to Investigate Sexual Violence and Gender-Based Crimes' in A. Schultheis Moore and J. Dawes (eds), *Technologies of Human Rights Representation* (SUNY Press 2022).

may be unaware of the context and nuance, such as the coded language that may be used on social media to signify CRSV.<sup>1714</sup>

Information on war crimes and crimes against humanity in Ukraine, too, may be hiding in plain sight. For example, satellite imagery can show the destruction of a civilian area through the use of prohibited weapons. As another example, intent to commit the crime against humanity of persecution may potentially be shown through social media posts calling for the collective punishment of a particular group; parliamentary records; media interviews; and other public statements. The list goes on.

Open-source investigations have been a valuable tool for CSOs seeking to document human rights abuses and international crimes in conflict situations around the world. The Syrian Archive is one such organisation. Founded in Turkey in 2014, the Syrian archive is a CSO specialised in collecting and analysing user-generated documentation of human rights violations committed in the context of the Syrian conflict.<sup>1715</sup> After authentication, the information is made publicly available online, and has been used by several non-governmental and inter-governmental organisations to document violations, including Amnesty International, Human Rights Watch and the Independent International Commission of Inquiry on the Syrian Arab Republic.<sup>1716</sup>

This section provides a general overview of the key definitions and processes involved in open-source investigation. It should be treated merely as an introduction to open-source research such that practitioners are aware of alternative investigative options.

### 5.6.1 Concepts and Definitions

**Open-source information** is, at its most basic level, any information that is openly available to the public. ‘Open-source investigation’ involves deploying this publicly-accessible information to draw inferences and conclusions on a subject under consideration, or using open-source investigative techniques to find information, check the authenticity of a piece of information (e.g., by using geolocation to assess whether a video was captured at a particular location) or corroborate accounts.

As one learns more about this topic, one may come across the term ‘**OSINT**’, or **open-source intelligence**, defined as intelligence “[p]roduced from publicly available information that is collected, exploited, and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement”.<sup>1717</sup> Some prefer to use terms like ‘open-source information’ or ‘open-source research’ in place of ‘OSINT’ to decouple open-source information from its intelligence origins.<sup>1718</sup>

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<sup>1714</sup> A. Koenig and U. Egan, ‘Power and Privilege: Investigating Sexual Violence with Digital Open Source Information’ (2021) 19 *Journal of International Criminal Justice* 55, pp. 56-57.

<sup>1715</sup> J. Deutch and H. Habal, ‘The Syrian Archive: A Methodological Case Study of Open-Source Investigation of State Crime Using Video Evidence from Social Media Platforms’ (2018) 7 *State Crime Journal* 46, pp. 48-49.

<sup>1716</sup> J. Deutch and H. Habal, ‘The Syrian Archive: A Methodological Case Study of Open-Source Investigation of State Crime Using Video Evidence from Social Media Platforms’ (2018) 7 *State Crime Journal* 46, p. 72.

<sup>1717</sup> National Open Source Enterprise, ‘Intelligence Community Directive Number 301’ (US Office of the Director of National Intelligence, 11 July 2006), p. 8.

<sup>1718</sup> G. Fiorella, ‘First Steps to Getting Started in Open Source Research’ (*Bellingcat*, November 2021).

**Online open-source information** is defined by the Berkeley Protocol on Online Open Source Investigations ('Berkeley Protocol') as open-source information on the internet that any member of the public can obtain by request, purchase or observation.<sup>1719</sup>

Open-source information can take many **forms**. It may include 'traditional' open-sources, like newspaper coverage or information that can be found in archives. Online open-source information may encompass information found on social media (the platforms that are used can vary greatly from country to country); blogs; online news clippings; and NGO reports, as well as satellite imagery. Many forms of open-source materials that would typically have been found in dedicated archives, libraries or printed collections are now posted online – these may include legal judgments; legislation; responses to freedom of information requests; parliamentary debates; and reports of public meetings. The availability of open-source information, therefore, is nothing new, but what has changed is its *accessibility* – anyone with an internet connection and some rudimentary searching skills can find open-source information; and its *volume*<sup>1720</sup> – increased access to technology and social media usage worldwide means that there is a potentially huge dataset of information from which practitioners can draw.

Among the international standards on using public digital information, the Berkeley Protocol provides the most comprehensive guidelines for conducting online research with guidance on methodologies and procedures, analysis and the preservation of digital information.<sup>1721</sup> The goal is to ensure that such open-source information is obtained in a legal and ethical manner.

### 5.6.2 Uses, Limits and Pitfalls

When practitioners are unable to travel to a region where alleged human rights violations have taken place, material posted online can provide useful direct evidence of those violations. The following are five key advantages of using open-source information, as identified by prominent legal scholars:<sup>1722</sup>

- In developing an initial investigation plan;
- In generating lead evidence that can provide concrete avenues for further enquiry;
- In overcoming access barriers when gathering information from inaccessible locations;
- In amplifying marginalised voices and hearing from a broader range of perspectives; and
- In providing direct evidence of violations upon which findings can be based.

However, open-source information also has its disadvantages. It is particularly important to note that **open-source investigative techniques should not be seen as a means to replace traditional, on the ground investigations**. In particular, open-source investigations may distance practitioners from local communities, thereby creating an artificial divide between the 'source' of open-source information, namely those who may have taken enormous personal risks to capture the information

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<sup>1719</sup> Berkeley Protocol, p. 6.

<sup>1720</sup> Regarding the risk of over-documentation, *see* Section 5.1.

<sup>1721</sup> Berkeley Protocol, *especially* Chapter VI; OHCHR, 'Berkeley Protocol Gives Guidance on Using Public Digital Info Fight Human Rights' (1 December 2020).

<sup>1722</sup> Murray et al. (2022), pp. 558-564.

and post it online, and those analysing that information.<sup>1723</sup> This would, in turn, undermine the execution of a survivor-centred investigation.<sup>1724</sup> The analysis of open-source information is “far better carried out by, or involving, those with local knowledge”.<sup>1725</sup>

When conducting open-source investigations, practitioners should be mindful of gaps and ‘blind spots’ that can attach to the information itself, or arise from cognitive or technical biases.<sup>1726</sup> Similarly, whilst open-source information has the potential to democratise the documentation of international crimes by hearing a broader range of perspectives, it can also reflect some of the power imbalances and structural inequalities that lead to certain groups or perspectives being marginalised in the first place.<sup>1727</sup> To combat this, the techniques of maintaining objectivity and combatting bias in traditional investigations can be used.<sup>1728</sup>

Lastly, disinformation and misinformation are widespread phenomena online today. It is not uncommon for a video or photograph posted and shared widely online to be captioned as coming from one situation, only for a reverse image search to reveal that it was in fact first posted online many years previous in a different region. It goes without saying that relying on such misleading information (whether intentionally misleading or not) can have profound consequences for practitioners, their organisation and their reputations. Therefore, it is important to maintain a mindset that constantly questions what one is seeing, what it shows and how one knows what they know from that piece of information.

### 5.6.3 Fundamental Principles

As with all human rights work, open-source investigations must be driven by the ‘Do no harm’ principle.<sup>1729</sup> There are several important rules to follow throughout the collection stage. Firstly, the Berkeley Protocol recommends conducting open-source investigations as **close in time to the relevant events** as possible in order to capture original postings. This is key as social media websites maintain a policy of taking down content – such as graphic evidence of crimes against civilians – that violates their guidelines. However, preservation of any information is better than none so “near duplicates” posted later may also provide critical information and should be recorded.<sup>1730</sup>

Secondly, while conducting a search, it is important to maintain **objectivity**.<sup>1731</sup> Open-source investigations should include both incriminating and exonerating materials without favour. Objectivity should be integrated into the development of search parameters, including the selection

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<sup>1723</sup> L. McEvoy, ‘Centering the “Source” in Open Source Investigation’ (*OpenGlobalRights*, 21 January 2021); Y. McDermott, D. Murray and A. Koenig, ‘Whose Stories Get Told, and by Whom? Representativeness in Open Source Human Rights Investigations’ (*Opinio Juris*, 19 December 2019).

<sup>1724</sup> See e.g., Section 6.

<sup>1725</sup> D. Minogue and R. Makumbe, ‘Digital Accountability Symposium: Harnessing User-Generated Content in Accountability Efforts for International Law Violations in Yemen’ (*Opinio Juris*, 18 December 2019).

<sup>1726</sup> Y. McDermott, D. Murray and A. Koenig, ‘Open Source Information’s Blind Spot: Human and Machine Bias in International Criminal Investigations’ (2021) 19 *Journal of International Criminal Justice* 85, pp. 91-100.

<sup>1727</sup> S. Dyer and G. Ivens, ‘What Would a Feminist Open Source Investigation Look Like?’ (2020) 1 *Digital War* 5.

<sup>1728</sup> See Section 1.3.

<sup>1729</sup> See Section 1.1 and Section 6.

<sup>1730</sup> Berkeley Protocol, paras 157-175.

<sup>1731</sup> Berkeley Protocol, para. 27.

of search terms and the design of algorithms for automated searching, as well as in the review of collected materials. Peer review and ‘two-factor authentication’ (that is, analysing both the content and the source of the relevant information) are useful methodologies that ensure the objectivity of the information collection process.

Thirdly, the Berkeley Protocol recommends being mindful of **data collection ethics**: data minimisation principles (which require collecting no more information than needed); the increased vulnerabilities that data collection may create for witnesses and others; and the need for informed consent (*see* Section 6.2) for the use of the underlying materials for legal accountability purposes.<sup>1732</sup> Practitioners should also be mindful of their “footprint” – for example, too many people accessing the same website might raise flags that are problematic for others.

Fourthly, ensure the **organisation and searchability** of the information collected and avoid duplication of information. At a minimum, the coding of any archives should include the following: who (names of individuals, unit, command, etc. with consistent descriptions that may include a coding scheme); what (document? photo? video?); where (coordinates? city?); and when (date, made as narrow as possible).<sup>1733</sup>

Finally, throughout the process, ensure **transparency and accountability**.<sup>1734</sup> Maintain clear records around how the investigation was conducted, the processes used and standards adhered to, the nature and type of information found and how the information is stored (*see* below).

#### 5.6.4 Preliminary Considerations

**Preparation** is key to a successful open-source investigation. In fact, the preparatory steps of an open-source investigation are not dissimilar to that of a traditional one. The Berkeley Protocol contains a chapter on security and a chapter on preparation,<sup>1735</sup> as well as helpful templates for a digital threat and risk assessment, an online investigation plan and a digital landscape assessment.<sup>1736</sup> Close consideration should be given to those resources as an initial step in open-source investigation preparation. At the outset, it is important to develop an **information collection plan** for each question the practitioner needs to answer, outlining the process for how they propose to answer it (particularly to ensure that the group tasked with conducting the open-source investigation carries out its functions effectively). As it is easy to fall down ‘rabbit holes’ with online investigation, it may be useful to keep those key questions in clear view. One recommendation is sticking a post-it note with your research question onto your computer screen to keep them in mind throughout.

Another key facet of preparation is setting up a **workstation**. Amnesty International’s online course has a detailed chapter on setting up an open-source workstation, including which browser to use (they suggest Google Chrome), what tools to download in advance (including WeVerify and Google Earth Pro). Before getting started, practitioners are recommended to:

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<sup>1732</sup> Berkeley Protocol, Chapter II, Section C.

<sup>1733</sup> Berkeley Protocol, Annex IV.

<sup>1734</sup> Berkeley Protocol, paras 25, 38.

<sup>1735</sup> *See*, Berkeley Protocol, Chapters IV-V.

<sup>1736</sup> *See*, Berkeley Protocol, Annexes I-III.

1.	Devise a <b>workflow</b> for the investigation ( <i>see</i> Workflow Design, below) and the parameters of the investigation.
2.	Determine how the investigation is going to be <b>documented</b> and all of the steps to be taken.
3.	Consider <b>security and online safety</b> : alias accounts should be used for any platforms you wish to search. This may require the purchase of a new SIM card and email address so that the social media account can be verified. To protect your identity online, it is recommended to install a Virtual Private Network ('VPN'), which will mask your IP address. Ideally, you would use separate devices for personal and investigative use, but if that is not possible, ensure that you have cleared your browser history, logged out of all your personal accounts (and logged in to your alias identities) before starting investigative tasks. If using Google Chrome as your browser, you can create a separate Google account that you only use for investigative work, again to protect your identity. <i>Security in-a-Box</i> , developed by Front Line Defenders and Tactical Tech, provides a toolkit for digital security, covering basic principles such as how to create strong passwords and avoiding malware.
4.	Decide if you need to install Hunch.ly or similar <b>software for recording your steps</b> online.
5.	Decide whether you are going to use a site like archive.org to <b>archive relevant webpages</b> as seen on that date and time, and whether you need a plugin, like GoFullPage, to take screenshots of entire web pages.
6.	For important videos and images, which may be taken down by the platform or otherwise become unavailable later, determine how and where you are going to <b>preserve and store this sensitive information</b> . Do you have a data management plan in place?
7.	If you are working as part of a <b>team</b> , decide how you are going to share information on what avenues you or others have investigated and how you are going to prioritise what information gets selected for verification.
8.	Consider the risk of <b>vicarious trauma</b> from viewing distressing content and how to mitigate harm from the outset.
9.	Have a <b>support system</b> in place. For example, if working as part of a team, you could schedule regular check-in sessions to support each other. Implement a system to warn others on your team about distressing content before they view it.
10.	<b>Managers</b> should have systems in place to check in on subordinates and provide them a means to ask for support.
11.	Think about what helps you switch off, and build in time to your schedule for <b>self-care</b> .
12.	Implement <b>boundaries</b> between your personal space and your investigative workspace. Think about transition rituals you may implement to distinguish between your work and personal life.
13.	Further technical steps that you can take to protect yourself, include: <ul style="list-style-type: none"> <li>• Turning off the sound on videos/reducing colour vibrancy/reducing the size of videos or adding a post-it note or piece of cardboard to your screen to block out disturbing images that you don't need to see;</li> <li>• Turning off auto-play and the auto-download feature on messaging applications, thereby minimizing the element of surprise; and</li> <li>• Having separate accounts for personal and investigative use, implementing a clear work/life boundary online.</li> </ul>

Table 85: Setting up an Open-Source Workstation

These are just initial considerations; a full review of your workstation, computer and work methods should be undertaken, ideally as part of a team, to protect yourself and others before beginning an investigation.



### 5.6.5 Workflow Design

A structured and well-organised workflow is key to a successful open-source investigation. In advance, practitioners need to establish clear research questions, which, in turn, will inform what data needs to be collected, preserved and analysed. Two sample workflows are set out below.<sup>1737</sup>

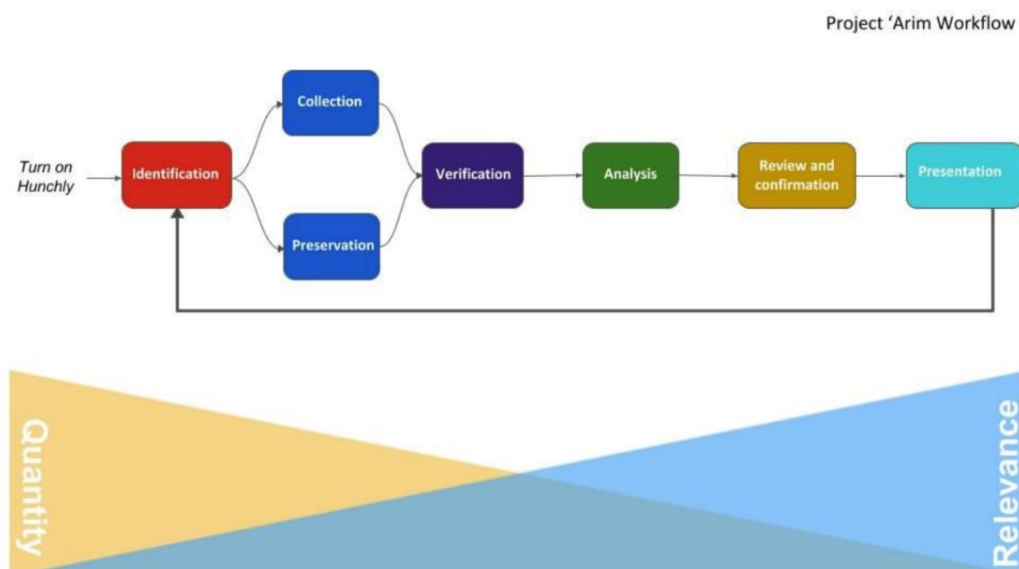


Figure 6: Bellingcat/GLAN Workflow Design

#### Open source investigation cycle



Figure 7: Berkeley Protocol Workflow Design

<sup>1737</sup> Bellingcat, 'Workflow: Project Arim'; Berkeley Protocol, p. 55.

These two workflows highlight the steps to be taken in an open-source investigation, with the Bellingcat/GLAN workflow adding steps for the confirmation and presentation of results. As can be seen from both figures, the process is **iterative and cyclical**. As the Berkeley Protocol notes: “[o]pen source investigations are rarely linear and often require repetition of this process given the cyclical nature of case-building. There may also be valid reasons for diverging from this order”.<sup>1738</sup> The following section provides some brief pointers in relation to each step in the workflow process.

#### 5.6.5.1 *Discovery, Preliminary Assessment and Collecting Data*

Having devised an information collection plan as part of the initial preparations, practitioners may determine it necessary to conduct a search to gather more information.

The Berkeley Protocol contains a very helpful ‘Digital Landscape Assessment Template’, which prompts the author to consider factors such as internet penetration (disaggregated by demographic – gender, age, etc.); popular websites and social media platforms; databases; media outlets; and so forth.<sup>1739</sup>

In this short Manual, it is impossible to provide a full overview of how to search and monitor particular platforms. However, specialised courses on discovery techniques are available online or offline.<sup>1740</sup>

An open-source investigation can start with an online inquiry encompassing two main processes:<sup>1741</sup>

1. **Searching:** discovering information and information sources through the use of general or advanced search methodologies; and
2. **Monitoring:** discovering new information through the consistent and persistent review of a set of constant sources.

The preliminary assessment should follow an online inquiry, i.e., practitioners should identify any materials in order to avoid over-collection and to comply with the principles of data minimisation and focused investigation.<sup>1742</sup>

After this, practitioners can move to the collection phase, i.e., gaining possession of online information through a screenshot, conversion to PDF, forensic download or other form of capture.<sup>1743</sup> Various collection methods<sup>1744</sup> can ensure the authenticity of a digital item.<sup>1745</sup>

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<sup>1738</sup> Berkeley Protocol, para. 140.

<sup>1739</sup> Berkeley Protocol, Annex III.

<sup>1740</sup> For example, Amnesty International’s free online course – ‘Open Source Investigations for Human Rights: Part 2’ – includes a set of basic guidelines on navigating and searching through Twitter, Facebook and YouTube, and some tools and techniques relating to translation and saving search strings: *see*, Advocacy Assembly, ‘Amnesty International: Open Source Investigations for Human Rights’. The Institute of International Criminal Investigation (IICI) also organises a specialised training course on open source investigation, delivered in collaboration with the Human Rights Center, University of California, Berkeley: *see*, <https://iici.global/courses/>.

<sup>1741</sup> Berkeley Protocol, paras 141-146; *See also* Section 1.3.1.

<sup>1742</sup> *See also* Section 1.3.1.

<sup>1743</sup> Berkeley Protocol, para. 153. *See also* Section 1.3.1.

<sup>1744</sup> Berkeley Protocol, para. 155.

<sup>1745</sup> Berkeley Protocol, para. 156. *See also* Section 5.5.3, above.

It is important to bear in mind that **no search is neutral**: your location, search history, device and other factors will lead the search engine or platform to tailor the results you see. In practice, if a practitioner is conducting a search for expressions of persecutory intent in social media posts, setting the preferred language of the web browser to Russian – rather than Ukrainian, English or another language – may return more relevant results. A search history may also cause some relevant information to appear on the second or third page following a Google search, as opposed to the first, and may therefore be missed. While it is impossible to have a neutral search, some measures can be taken by clearing the browser’s search history, using an anonymous browser tab, using a VPN to hide the user’s location and logging out of all personal accounts before beginning a search. *See* Section 1.3, above.

Results of open-source investigations must be properly recorded in the Documentation Folder for their further use in criminal proceedings (*see* Section 4.1.2).

#### 5.6.5.2 *Preservation*

One cannot assume that because online open-source information is available today, it will still be online in the future. Algorithms and procedures developed by social media companies to remove harmful or violent content from their platforms can also remove valuable evidence of human rights violations in the process. Thus, practitioners may wish to save open-source items for future use.

The Berkeley Protocol recommends preserving a clean original of the collected digital item in the format(s) in which it was collected. Should practitioners wish to edit or manipulate the digital item for the purposes of analysis or verification, a copy should be made to avoid compromising the original.<sup>1746</sup> Additionally, practitioners should preserve metadata, links, networks, content and all comments from relevant social media and other sites.<sup>1747</sup>

Information may be stored locally, e.g., to a password-encrypted hard drive kept in a locked cabinet, to a networked drive that is part of a local area network or remote server, or to the cloud.<sup>1748</sup> How information is to be stored depends on: the sensitivity of the digital content and the relative security of the different options; cost; storage capacity; accessibility; long-term sustainability; and relevant laws including data protection legislation.<sup>1749</sup> This should be considered in drawing up your documentation plan. A standardised data collection system (such as an itemised spreadsheet) should be used to keep track of what is stored, where, and what items have been verified or require verification.<sup>1750</sup> An ethical consideration arises here in relation to the agency of the person who first shared the information online and whether they have given you their informed consent to store and use that piece of information. Where possible, steps should be taken to obtain informed consent, unless it would put the uploader at risk to do so.<sup>1751</sup>

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<sup>1746</sup> Berkeley Protocol, para. 169.

<sup>1747</sup> Berkeley Protocol, paras 157-175.

<sup>1748</sup> *See* Section 4.2.

<sup>1749</sup> *See* Section 1.4.

<sup>1750</sup> *See* Section 4.1.2, including a record of investigative activities.

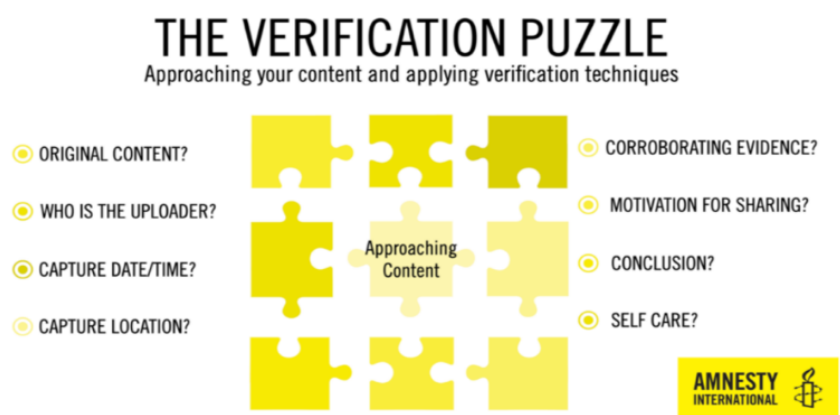
<sup>1751</sup> *Cf.* Sections 1.5 and 1.6.

The [Yemeni Project](#), for example, developed a protocol through which the URL of any content investigators wish to preserve may be copied into a spreadsheet, digitally hashed and its integrity preserved.<sup>1752</sup> In addition, the [Syrian Justice and Accountability Centre](#) has developed its own relational database software known as “Bayanat”, through which the organisation has successfully preserved over 1.8 million pieces of data, including more than 350,000 videos.<sup>1753</sup>

Unstable internet connection may pose a barrier to practitioners conducting open-source investigations in conflict areas, particularly when trying to preserve information. To mitigate against this issue, [Myanmar Witness](#), a local CSO dedicated to collecting open-source information on human rights abuses in Myanmar, collaborates and shares information with the UN Independent Investigative Mechanism for Myanmar, who are then able to preserve and verify the materials.<sup>1754</sup>

### 5.6.5.3 Verification

Verification is “the process of establishing the accuracy or validity of information that has been collected online”.<sup>1755</sup> It is useful to think about verification as a ‘puzzle’, where each of the pieces can work together to help assess whether the piece of content is what it purports to be, as outlined in the diagram.



The ‘Checklist for Verifying Content’, below, proposed by Amnesty International, identifies eight questions to run through in approaching each piece of content for verification purposes:<sup>1756</sup>

No.	Question	Answer
1.	Is the content you are viewing original?	
2.	Who is the uploader?	
3.	When was the content captured?	
4.	Where was the content captured?	
5.	Can you identify any other corroborating evidence?	
6.	What is the source’s motivation for sharing this content?	
7.	What conclusions can be drawn from the content	

<sup>1752</sup> N. Waters, ‘Bellingcat’s Yemen Project’ in M. Mair et al. (eds) *Investigative Methods: An NCRM Innovation Collection* (Southampton, National Centre for Research Methods, 2022) 19, p. 22.

<sup>1753</sup> Syria Justice and Accountability Centre, ‘Violations Database’.

<sup>1754</sup> R. Burley, ‘The launch of Myanmar Witness’ (Centre for Information Resilience, 2021).

<sup>1755</sup> Berkeley Protocol, para. 176.

<sup>1756</sup> Advocacy Assembly, ‘Verification Checklist for Open Source Investigations’ (8 March 2021).

	analysed?	
8.	Are you practicing effective self-care?	

Table 86: Checklist for Verifying Content

Every investigation is different. Each piece of content may present different challenges in terms of how informative it is and whether additional corroborating evidence exists. Nonetheless, there are a number of common tools and techniques that can be used in verification:

- **Reverse image searching:** helps determine whether a video/image has appeared online before. Google Chrome's WeVerify plugin includes tools for extracting key frames from videos and conducting reverse image searches across several search engines (including Google and Yandex);
- **Viewing Exchangeable Image File Format ('EXIF') Data:** may not always be available (if the content was found on a social media platform that strips the metadata, or if it is not the original), but where available, EXIF data can reveal when the image was created, what device was used, whether Photoshop was used to edit the image, and, depending on the device used to capture the image, the GPS co-ordinates. Sites like <https://exifdata.com> and the WeVerify plugin can extract the EXIF data from image files.
- **Geolocating content:** even where location data is unavailable from the EXIF data, visual clues (e.g., signposts; shopfronts; landscape features, such as mountains; or landmarks, such as tall towers or statues) can be used to try to ascertain where a video or image was captured. Even where EXIF data is available and suggests a location via GPS, it is always good practice to independently check this data. Satellite imagery, or tools like Google's Street View, can be compared with the piece of content to determine whether the visual features match.

Other advanced tools (for example, SunCalc, used to calculate shadow lengths in photographs and videos) are used by experienced investigators, and new tools for open-source human rights investigations (such as those hosted on the OSR4Rights Tools Hub) are constantly being developed and made available. Online communities, such as Twitter, are a good place to learn more about these tools, as are specialist training programmes such as those listed below.

The [Syrian Network for Human Rights](#) is an independent human rights organisation engaged in the documentation of human rights violations in Syria. During the verification phase, each video collected passes through several audits, during which the following is established: the date, time and location at which the recording took place; the date the video was first uploaded; and who uploaded it.<sup>1757</sup>

It goes without saying that the process of verification raises ethical concerns. As with traditional means of documentation, these should be considered as part of the planning *before* the open-source investigation starts. Verification may reveal sensitive information, such as the uploader's real name or their political affiliation, and the value of this information should be weighed carefully against the risk of harm to the creator, uploader, people featured in the content, the practitioners themselves,

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<sup>1757</sup> Syrian Network for Human Rights Working Methodology, p. 29.

the investigating organisation and other stakeholders. To navigate through some of these ethical considerations particularly relevant in an open-source investigation, practitioners are encouraged to consult the latest research in this regard.<sup>1758</sup>

#### 5.6.5.4 Analysis

When analysing open-source information, practitioners need to be mindful of what they *cannot* conclude from the information as well as what they can. Practitioners should devise multiple working hypotheses and be careful not to fall into the trap of confirmation bias, i.e., when the information is interpreted as confirming a favoured theory where another reasonable interpretation is possible.<sup>1759</sup> There are methods that can serve as a check against biases that may impact on information analysis, such as peer review of results, appointing evidence review panels, and/or incorporating a ‘red team’ whose role it is to build competing hypotheses.<sup>1760</sup>

During the visual analysis phase, the SNHR cross-check each photograph/video against any others documenting the same incident, before linking them with direct witness accounts and any other available details such as satellite imagery.<sup>1761</sup>

Cues for Practitioners <sup>1762</sup>	
<b>How was the content obtained?</b>	Think about what information channels the content travelled through before arriving on your desk. How many times did it change hands?
<b>Who created the content?</b>	Is the person who shared or uploaded the content online also the creator, or was it someone else? Ask if you do not know.
<b>Where is the content from?</b>	Descriptions and metadata can be forged. Are there visible landmarks or sounds (like police sirens or dialects) that can help you verify a location or time? If you are concerned about the authenticity of the images, you should employ an experienced member of your team or other professional to geolocate the landmarks in the images. <sup>1763</sup>
<b>When was the content created?</b>	You may not always be able to trust the date stamp on a file. Are there visual clues like the weather?
<b>Why was the content created?</b>	Can you determine the motivation for sharing the content? What interests does the uploader have?

Table 87: Analysing Open-Source Information

<sup>1758</sup> For example, S. Dubberley and S. Dyer, *Human Rights Based Approaches to Digital Open Source Investigations* (Human Rights Big Data and Technology Project, forthcoming 2022) is an invaluable resource.

<sup>1759</sup> On the ‘blind spots’ of open source research, *see also*, D. Minogue and R. Makumbe, ‘Digital Accountability Symposium: Harnessing User-Generated Content in Accountability Efforts for International Law Violations in Yemen’ (*Opinio Juris*, 18 December 2019).

<sup>1760</sup> *See* Section 5.6.3.

<sup>1761</sup> Syrian Network for Human Rights Working Methodology, p. 29.

<sup>1762</sup> The Berkeley Protocol contains several templates that prosecutors can use in the course of their investigation. *See*, Berkeley Protocol, Annexes I-V.

<sup>1763</sup> Freeman (2018), pp. 316-319.



## 6 SURVIVOR-CENTRED PRINCIPLES FOR DEALING WITH VICTIMS AND WITNESSES

With a view to assisting practitioners in understanding the best practice principles for dealing with victims and witnesses of international crimes, this section will address the following themes:

- **6.1 ‘Do No Harm’:** understanding what ‘Do no Harm’ means, who should observe the ‘Do no Harm’, and how to conduct a risk assessment and risk mitigation.
- **6.2 Informed Consent:** understanding what informed consent means and when and how informed consent should be obtained.
- **6.3 Sharing Information:** understanding victim participation and compensation/reparations in the Ukrainian criminal justice system and before the International Criminal Court;
- **6.4 Confidentiality:** understanding how to protect the confidentiality of victims and witnesses.
- **6.5 Referrals:** understanding how to establish the necessary pathways to social and support networks to facilitate victim access.
- **6.6 Principles Relating to Witness Statements and Interviews:** understanding how to follow survivor-centred best practices in interviewing (i.e., the PEACE model), and how to interview particularly vulnerable individuals.

### 6.1 ‘DO NO HARM’

#### 6.1.1 What Does ‘Do no Harm’ Mean?

‘Do no harm’, which is one of the Six Essential Investigative Rules (*see* Section 1.1), is a basic principle of human rights monitoring<sup>1764</sup> in broad use within the fields of humanitarian and human rights law,<sup>1765</sup> and, more recently, in the international criminal justice sector.<sup>1766</sup> ‘Do no harm’ requires practitioners to recognise the potential harmful impact of their interventions (from initial approaches right through to the trial itself) with victims and witnesses, and take steps to:

1. Avoid exposing them to risk through their actions;<sup>1767</sup> and

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<sup>1764</sup> Office of the United Nations High Commissioner for Human Rights (‘OHCHR’), ‘Manual on Human Rights Monitoring: Chapter 2 – Basic Principles of Human Rights Monitoring’ (2011) HR/P/PT/7/Rev1 (‘OHCHR Manual on Human Rights Monitoring: Chapter 2’), p. 4.

<sup>1765</sup> *See e.g.*, Sphere, ‘Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response: Protection Principle 1’ (2018).

<sup>1766</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08, Observations Relevant to Reparations, 31 October 2016, para. 22; International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), ‘ICTY Manual on Developed Practices’ (2009) (‘ICTY Manual on Developed Practices’), p. 34.

<sup>1767</sup> S. Cocan, J. Rikhof, and É. Sullivan, ‘Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration’ (2018) (‘Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration’); F. D’Alessandra, et al., Public International Law & Policy Group (‘PILPG’), ‘Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practice’ (2016) (‘PILPG Handbook’), pp. 8, 21-22.

## 2. Mitigate their possible negative effects.<sup>1768</sup>

Implementing the principle of ‘Do no harm’ during interactions with victims and witnesses means working with a victim-centred approach,<sup>1769</sup> not exhibiting judgmental behaviour,<sup>1770</sup> never blaming a victim<sup>1771</sup> and always prioritising the safety of the victims and witnesses over the information they may possess.<sup>1772</sup> ‘Do no harm’ and its related principles are core to the victim-centred interview techniques discussed in Section 6.6.

As part of a victim-centred approach, practitioners should adapt to and respect the victims and witnesses’ individuality. In particular, practitioners should tailor their interventions with victims and witnesses to their specific identities, characteristics, groups and contexts, such as their age, gender, evolving capacities, resilience, relationships, socio-economic and political situation, and the discrimination they face.<sup>1773</sup> Measures designed to mitigate possible negative effects of these interventions should be based on an individualised assessment of the potential risks to the victim/witness, taking into account the specific nature of the crime, vulnerabilities of their situation and identity.<sup>1774</sup> This is done through ‘risk assessments’, which are discussed in more detail in Section 6.1.3.

Crucially, in doing so, ‘Do no harm’ requires the practitioner to listen to the views of the victim or witness, and ask them what they want, their priorities, concerns, risks and current situation.<sup>1775</sup> It also requires practitioners to prioritise the victim/witness’s safety, well-being and dignity ahead of the objectives of the documentation process.<sup>1776</sup> Essentially, the ‘Do no harm’ principle requires practitioners to be inclusive and to not discriminate (or tolerate any form of discrimination by their

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<sup>1768</sup> S.F. Ribeiro and D. van der Straten Ponthoz, ‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law’ (2<sup>nd</sup> edn, UK Foreign & Commonwealth Office 2017) (‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict’), p. 85; Council of Europe (‘CoE’) Explanatory Report to the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) CETS No. 210 (‘Istanbul Convention Explanatory Report’), paras 116, 255; United Nations Office on Drugs and Crime (‘UNODC’) ‘Handbook on Effective Prosecution Responses to Violence Against Women and Girls’ (UN 2014) (‘UNODC Handbook on Effective Prosecution Responses to Violence Against Women and Girls’), p. 25; PILPG Handbook, pp. 8, 21-22; African Commission on Human and Peoples’ Rights, ‘The Guidelines on Combatting Sexual Violence and its Consequences in Africa’ (African Union (‘AU’) 2017), p. 18.

<sup>1769</sup> IASC (‘Inter-Agency Standing Committee’), ‘How to Support Survivors of Gender-Based Violence When a GBV Actor is Not Available in Your Area: a Step-by-Step Pocket Guide for Humanitarian Practitioners’ (2015) (‘GBV Pocket Guide’), pp. 2-3; United Nations Population Fund (‘UNFPA’), ‘9 Ethical Principles: Reporting Ethically on Gender-Based Violence in the Syria Crisis’ (2015), p. 9; OHCHR, ‘Protection of Victims of Sexual Violence: Lessons Learned’ (2019) (‘OHCHR Lessons Learned’) pp. 3-5.

<sup>1770</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 14, 138, 280; GBV Pocket Guide, pp. 7, 15.

<sup>1771</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 138, 180, 280; S. Paine MBE, ‘Rape: The Victim Experience Review’ (UK Home Office 2009), p. 11.

<sup>1772</sup> Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration; ICTY Manual on Developed Practices, p. 34.

<sup>1773</sup> Institute for International Criminal Investigations (‘IICI’), Nadia’s Initiative, Preventing Sexual Violence in Conflict Initiative of the UK government (‘PSVI’), ‘Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence’ (13 April 2022) (‘Murad Code’), Principle 1.1.

<sup>1774</sup> Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration.

<sup>1775</sup> Murad Code, Principle 1.3.

<sup>1776</sup> Murad Code, Principle 1.4.

colleagues).<sup>1777</sup> This includes respecting the victim's/witness's expression of identity (including their gender, pronouns, disability and other characteristics).<sup>1778</sup>

Particular attention should be paid to traumatised victims, and victims of conflict-related sexual violence ('CRSV') and torture who, initially harmed by their perpetrators, can be further harmed by the criminal justice process,<sup>1779</sup> during which they may be subjected to unresponsive, insensitive, inadequate and poorly prepared interventions by police, prosecutors and judges.<sup>1780</sup> 'Do no harm' requires practitioners to recognise these negative behaviours and address them to reduce their negative effects.

### **6.1.2 Who Should Observe the 'Do no Harm' Principle, and When?**

'Do no harm' is based on the safety and dignity of victims of crime.<sup>1781</sup> It engages investigators, police, prosecutors and judges and also applies to any person involved in the documentation, investigation and prosecution of international crimes, such as civil society organisations ('CSOs'), defence counsel, intermediaries, local communities and journalists.<sup>1782</sup>

'Do no harm' is an ongoing principle<sup>1783</sup> that underpins all stages of the criminal justice process and has been translated into concrete measures in dealing with victims/witnesses of crime, many of which are recommended as international best practices throughout this Manual. Properly implemented, 'Do no harm' can enable victims of crime to have ownership of their story and experience<sup>1784</sup> in any accountability measures.

As such, practitioners should be aware that they have a responsibility to do no harm throughout all stages of the documentation process and should take active measures to implement this principle.

### **6.1.3 Risk Assessment**

'Do no harm' requires practitioners to share responsibility for the protection of victims/witnesses throughout all stages of the criminal justice process.<sup>1785</sup> This is done through a risk assessment. A risk assessment is one of the first,<sup>1786</sup> and most important, steps practitioners should take when dealing

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<sup>1777</sup> Murad Code, Principle 1.8.

<sup>1778</sup> Murad Code, Principle 1.7.

<sup>1779</sup> OHCHR, 'Latin America Model Protocol for the Investigation of Gender-Related Killings of Women (Femicide/Feminicide)' (2014), para. 61.

<sup>1780</sup> US Department of Justice, 'National Hate Crimes Training Curricula-Student Manual' (1998) ('Hate Crimes Training Curricula'), pp. 50, 54.

<sup>1781</sup> Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration.

<sup>1782</sup> Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration.

<sup>1783</sup> PILPG Handbook, p. 21.

<sup>1784</sup> Murad Code, Principle 2.3.

<sup>1785</sup> CoE, Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No.210 ('Istanbul Convention'), Article 56; Istanbul Convention Explanatory Report, para. 260; Committee on the Elimination of Discrimination against Women ('CEDAW'), 'General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19' (14 July 2017) CEDAW/C/GC/35 ('CEDAW General Recommendation No. 35'), para. 40(b).

<sup>1786</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 92; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the

with victims/witnesses. Accordingly, practitioners should first conduct a risk assessment when preparing to document international crimes, especially prior to interviewing any victim/witness, and such risk assessments should be repeated throughout the criminal justice process.<sup>1787</sup> Information on how to conduct a risk assessment is considered in Section 4.4.

Because ‘Do no harm’ is an ongoing principle, and given the risks inherent in the Ukrainian context, the obligation to monitor and assess risks arises prior to, and extends beyond, a specific intervention or interaction with a victim or witness. This calculation is essential to identifying a wider range of potential risks that can impede witnesses’ and victims’ security, and can call for measures to be taken such as the provision of psychological or medical assistance.

When assessing the potential risks which could arise from their interventions, practitioners should identify the nature and source of the threat,<sup>1788</sup> and be cognisant of the fact that these risks can not only cause harm to the victim or witness themselves, but also their families and the broader community.<sup>1789</sup> It is also essential to seek the views of the victims/ witnesses when assessing harm,<sup>1790</sup> and to take into account the specific needs of vulnerable individuals (*see* Section 6.6.2) who may have additional and specific needs.<sup>1791</sup>

The assessment should take into account the individual characteristics of the victim (i.e., their gender, age and other intersectional factors, including varying personal characteristics that can lead to disadvantages and/or discrimination, which include, among others, ethnicity/race (such as the Roma people of Ukraine); religion; culture; political opinion; mental or physical disability; sexual orientation and gender identity; and displacement), the nature of the crime, the circumstances of the crime and the context in which it took place, as well as their relationship to the perpetrator.<sup>1792</sup> The weight that these characteristics carry within the risk assessment will vary depending on the context of the individual situation. The risk assessment should also include the victim’s own assessment of risk.<sup>1793</sup>

Among others, practitioners should consider the following possibilities when conducting risk assessments:

1. Retaliation, intimidation or threats by alleged perpetrators, their families and supporters against victims, witnesses and their families;<sup>1794</sup>

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Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA (‘Directive 2012/29/EU’), Article 22(1); CEDAW General Recommendation No. 35, para. 40(b); PILPG Handbook, p. 22.

<sup>1787</sup> PILPG Handbook, p. 45; Istanbul Convention, Article 51(2); Istanbul Convention Explanatory Report, para. 260; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 92; Crown Prosecution Service (‘CPS’), ‘Legal Guidance, Domestic Abuse’ (4 April 2022).

<sup>1788</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 93, 127.

<sup>1789</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 93.

<sup>1790</sup> Murad Code, Principle 1.3.

<sup>1791</sup> Istanbul Convention Explanatory Report, para. 87.

<sup>1792</sup> Directive 2012/29/EU, Article 22(2)-(3); UNODC, ‘Handbook on Effective Prosecution Responses to Violence against Women and Girls’ (2014), pp. 54-55.

<sup>1793</sup> EIGE, ‘Risk Assessment and Risk Management by Police: Step 2’.

<sup>1794</sup> PILPG Handbook, p. 39.

2. Punishment, including physical violence, by members of the victim's/witness's immediate community, family or caregiver;<sup>1795</sup>
3. Re-traumatisation;<sup>1796</sup>
4. Particular risks of reporting an act of sexual violence, including those faced by vulnerable groups and those with intersectional factors,<sup>1797</sup> such as lack of social support, isolation, gender identity or sexual orientation, ethnic background, age or immigration status, among others;<sup>1798</sup>
5. The coercive pressure victims/witnesses may be subjected to attempting to force them to reconcile with perpetrators;<sup>1799</sup>
6. Rejection of victims or witnesses by family members or their community, resulting, for instance, in isolation, or, as occurs often in the case of CRSV, abandonment of children.<sup>1800</sup> They may be stigmatised or isolated.<sup>1801</sup> Understanding the social attitudes and gender-dynamics within the Ukrainian context will enable practitioners to accurately assess risks; and
7. Arrest and punishment (e.g., when certain acts are criminalised).<sup>1802</sup>

Recognising that continued contact with a victim/witness could increase their risks,<sup>1803</sup> practitioners should ensure that each successive intervention includes an assessment of anything that might have changed as a result of previous interactions.

In some cases, rapid interviews may be necessary to secure the information. Regardless of any time constraints, an interview must only take place after **adequate protective measures** have been put in place.

#### **6.1.4 Risk Mitigation: Using Available and Appropriate Protective Measures**

Risk mitigation may also require designing a coordinated safety plan for victims/witnesses, particularly for those most vulnerable and at high risk.<sup>1804</sup> This may involve: (i) protective measures provided for under Ukrainian legislation;<sup>1805</sup> and (ii) measures that go beyond the protective

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<sup>1795</sup> PILPG Handbook, p. 39.

<sup>1796</sup> PILPG Handbook, p. 39.

<sup>1797</sup> Istanbul Convention, Article 46(c); Istanbul Convention Explanatory Report, paras 87, 238; EIGE, 'Risk Assessment and Risk Management by Police: Step 3' ('Risk Assessment and Risk Management by Police: Step 3').

<sup>1798</sup> Istanbul Convention Explanatory Report, para. 87; Risk Assessment and Risk Management by Police: Step 3.

<sup>1799</sup> PILPG Handbook, p. 39.

<sup>1800</sup> PILPG Handbook, p. 39.

<sup>1801</sup> UK Foreign and Commonwealth Office, 'Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence' (2017) ('Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence'), pp. 7, 57; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 26.

<sup>1802</sup> PILPG Handbook, p. 39; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 127.

<sup>1803</sup> ICTY Manual on Developed Practices, para. 48.

<sup>1804</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 93, 127; Istanbul Convention Explanatory Report, para. 261; UK College of Policing, 'Investigation: Working with Victims and Witnesses'.

<sup>1805</sup> Law of Ukraine 'On ensuring the security of persons involved in criminal proceedings' of 23 December 1993 No. 3782-XII ('Law of Ukraine No. 3782-XII'), Article 7; Criminal Procedure Code of Ukraine of 13 April 2012 No. 4651-VI ('CPC'), Article 56(1)(5), 66(1)(8).

measures prescribed by law that can be implemented by practitioners. As CSOs do not have the ability to provide victims/witnesses the protective measures provided for under Ukrainian legislation, it is important to refrain from taking any steps that may pose a risk to the victim/witness, as well as the information they may possess. This includes deciding not to interview a victim/witness who may need witness protection or, if you decide interviewing said individual is in their best interest, ensuring that you provide all information collected from these individuals to the Ukrainian Office of the Prosecutor General (‘OPG’) (provided that you have obtained their informed consent to do so, *see* Section 6.2) in order to help advance their case to trial and to facilitate their access to the full range of available protective measures, victim status and reparations if their case is successful at trial.

#### **6.1.4.1 Measures Available to Practitioners to Protect Victims and Witnesses**

While CSO practitioners do not have the ability to provide the protective measures available under the Ukrainian Criminal Procedure Code (‘CPC’) or Ukraine’s Law “On ensuring the security of persons involved in criminal proceedings”,<sup>1806</sup> there are protective measures available to practitioners that go beyond those prescribed by law, which include, for example, the provision of psychological or medical assistance prior to interviews (*see* Section 6.5), conducting interviews at a certain time or location (*see* Section 6.6), conducting interviews with staff of a particular gender or with trauma expertise, providing safe transportation to and from interviews and, if applicable, contacting foreign partners in order to secure rehabilitation or relocation abroad. These additional measures will be essential since Ukrainian legislation does not envisage the provision of psychological support to persons in the protection programme.<sup>1807</sup>

In particular, practitioners should:

- (i) Consider the medical, psychological and other support services that the victim or witness can access, and whether these services are adequately equipped to provide the necessary assistance (*see* referral pathways discussed in Section 6.5).<sup>1808</sup>
- (ii) Inform victims about all aspects of their cases about which the practitioner is aware (e.g., the judgment, the provisional release of the defendant, the available services, etc.) (*see*

<sup>1806</sup> CPC, Articles 56(1)(5), 66(1)(8); Law of Ukraine No. 3782-XII, Article 7.

<sup>1807</sup> *See*, relevant recommendations in UHHRU, ‘Problems of Ensuring Protection Measures’, p. 31; T. Semkiv, ‘Improving the Security of Persons Involved in Criminal Proceedings’ (2017) 3 *Scientific Journal of the National Academy of Prosecutors of Ukraine* 119, p. 126.

<sup>1808</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA (‘Directive 2012/29/EU’), Preamble, paras. 38, 40, Articles 8-9; Council of Europe (‘CoE’), Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No.210 (‘Istanbul Convention’), Article 56(1)(c); International Protocol on the Documentation and Investigation of CRSV, pp. 14, 16, 94, 164; Explanatory Report to the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) CETS No. 210 (‘Istanbul Convention Explanatory Report’), paras 138-142, 255; Alberta Justice and Solicitor General, Sexual Violence Police Advisory Subcommittee, ‘Best Practice Guide for Law Enforcement Investigations into Sexual Violence’ (2018), p. 10; US Department of Justice, ‘Student Manual: National Hate Crimes Curricula’, pp. 50, 54; OHCHR, ‘Protection of Victims of Sexual Violence: Lessons Learned’ (2019), pp. 4-5.



Section 6.3).<sup>1809</sup> This may include creating and distributing brochures containing information about the victims' rights (e.g., legal aid, psychological support, protection, etc.).

- (iii) Consider available strategies (including ensuring confidentiality and conducting trauma-informed interviews) to mitigate the risk of re-traumatisation, intimidation and retaliation that a victim or witness might face when cooperating with the documentation process (*see* Sections 6.4 and 6.6).

## 6.2 INFORMED CONSENT

### 6.2.1 What is informed consent?

Linked to 'Do no harm', 'prior informed consent' is an ethical principle grounded in the right to self-determination and respect for personal autonomy.<sup>1810</sup> In the context of the documentation of international crimes, informed consent involves practitioners:<sup>1811</sup>

- (i) Proactively and carefully explaining the different stages of the criminal justice process to a victim or witness in a culturally appropriate and context-specific way;
- (ii) Making clear how their information will be used at each stage of the process, including the consequent risks to their safety and security; and, having done so
- (iii) Asking if they still agree to participate.

This means presenting the information in a manner and form that the victim or witness will understand. In practice, for example, this might mean that victims or witnesses who do not speak Ukrainian may require translators to ensure the meaning of informed consent is fully understood. It also means that all explanations should be appropriate to the level of education, knowledge and understanding of the victim/ witness, taking into account age or any possible illnesses or disabilities, which may impact on the way the victim/witness understands and agrees to participate in the criminal justice process.

Informed consent ensures that victims of crime maintain full control over their experiences and are informed, willing participants in the criminal justice process. This is particularly important in cases of sexual violence.<sup>1812</sup> It allows them time to reflect on the potential consequences of providing information and is therefore important in order to build a victim's trust.<sup>1813</sup>

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<sup>1809</sup> Humanitarian Law Center, *Model Strategy for the Prosecution of War Crimes committed in the Former Yugoslavia* (2015-2025), p. 27.

<sup>1810</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 89; GBV-Sub Cluster (Turkey Hub-Syria), 'Standard Operating Procedures for Gender-Based Violence Prevention and Response' (November 2018) ('Standard Operating Procedures for Gender-Based Violence Prevention and Response'), p. 35.

<sup>1811</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 89-90.

<sup>1812</sup> Ontario Association of Chiefs of Police, 'Canadian Framework for Collaborative Police Response on Sexual Violence' (2019) ('Canadian Framework for Collaborative Police Response on Sexual Violence'), pp. 8-9, 12; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 89.

<sup>1813</sup> Canadian Framework for Collaborative Police Response on Sexual Violence, p. 16.

Practitioners should be cognisant of the individual characteristics of the victim or witness which may impair their ability to fully comprehend the relevant facts and their competency to provide informed consent. This may include children (depending on their age and other factors such as maturity), or adults with severe intellectual disabilities, mental illness (including traumatisation) or other physical, mental or emotional conditions. In such cases, the permission of a legally authorised representative in accordance with applicable law must be sought in lieu of informed consent.<sup>1814</sup>

Practitioners should inform the victim/witness about what they can do for them in terms of protective measures and confidentiality, as well as what the OPG and/or the Office of the Prosecutor of the International Criminal Court ('ICC') can do in this regard, if applicable (*see* Sections 5.1.2.5, 6.1.4 and 6.4 for more information on confidentiality and protective measures).

### **6.2.2 When and How Should Informed Consent be Obtained?**

Informed consent should be explicit and ongoing. It should be obtained before gathering any information from the interviewee and should be reaffirmed before every successive intervention,<sup>1815</sup> including: recording any interview on an electronic device; taking notes of any interview; taking photographs; a medical or other examination; scanning or otherwise reproducing any documents or other information the victim/witness might have; referring them to any support services; or sharing their information with third parties (among others).<sup>1816</sup>

Where these interventions involve different actors, it will be important to ensure that information delivered to the victim or witness remains clear and consistent. Where appropriate, this may mean doing so through a *pro forma* template. Where practical, and in those cases where the victim or witness is able to write, they should be asked to indicate in writing whether they consent to disclosure of their information/evidence to the specific justice mechanism, whether local, national or international. This may be done, for example, within the body of any witness statement. Where this is not possible, the consent may be audio-recorded.<sup>1817</sup>

Informed consent should be voluntary,<sup>1818</sup> meaning that the victim or witness should not be coerced or put under any pressure to provide consent. Additionally, due to the ongoing fighting, practitioners may find themselves working outside their usual places of work, including in internally displaced person ('IDP') centres and/or recently liberated territories with little or no expectation of privacy. Interviews or interventions conducted in these settings therefore risk exposing victims or witnesses to coercive circumstances. Consequently, in these situations, practitioners should recognise the possible negative effects these kinds of interview environments may have in securing voluntary informed consent and, wherever possible, take steps to mitigate those effects. This may include trying to speak to the victim/ witness alone in a safe, private location, where they are not influenced by others (*see* Section 6.6.1).

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<sup>1814</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 89.

<sup>1815</sup> PILPG Handbook, pp. 23-24.

<sup>1816</sup> PILPG Handbook, p. 23.

<sup>1817</sup> PILPG Handbook, p. 24.

<sup>1818</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 89.

When explaining and obtaining informed consent, practitioners should not rush. They should make sure the victim/witness has sufficient time to make a considered decision and ask any questions they wish (*see* Section 6.6.1). Practitioners should also explain to the victim/witness that they are free to leave and withdraw from the process at any time (*see* Section 6.6.1).

It is recommended that, wherever possible, practitioners undertake the following steps to ensure informed consent:<sup>1819</sup>

- Make sure the victim or witness is informed and understands what they are consenting to;
- Provide the victim or witness with full, clear, understandable, objective and honest information about their range of options, rights and risks to allow them to make their own informed choices whether to engage or not, and on what terms;<sup>1820</sup>
- Ensure that the victim or witness understands the implications (benefits and risks) of participating in the justice process, such as the difference between their involvement in ICC investigations, for example, and domestic criminal trials;
- Ask the victim or witness about their security concerns (for those who have previously given information/evidence, ask them whether they have any concerns as a result of that testimony);
- Discuss what measures can realistically be put in place to protect the victim or witness, and ensure they understand the risks that remain (*see* Sections 6.1.3 and 6.1.4);<sup>1821</sup>
- Check that the victim or witness has understood the information you have provided and precisely what they are consenting to by asking them to explain what they have understood and clarify when necessary;<sup>1822</sup>
- Be aware of factors that may impede the ability to give informed consent, such as literacy level, age or disabilities that inhibit understanding. Take measures to enable consent (such as gaining the consent of a legal guardian or caregiver where appropriate). If this is not possible, do not attempt to gain consent and stop the planned activity;
- Use a language that is understood by the victim or witness and provide interpreters if necessary and appropriate. If none are available, understand that true informed consent cannot be given;<sup>1823</sup> and
- Avoid unrealistic promises given to the victim/witness regarding the benefits of their participation in the criminal justice process, such as guarantees of bringing the perpetrator to justice or available protective measures.<sup>1824</sup>

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<sup>1819</sup> See e.g., Syria Justice and Accountability Centre, 'SJAC Gender & SGBV Documentation Policy' (February 2015) ('SJAC Gender & SGBV Documentation Policy'), pp. 10-11; Standard Operating Procedures for Gender-Based Violence Prevention and Response, p. 36.

<sup>1820</sup> Murad Code, Principle 2.2.

<sup>1821</sup> See e.g., Directive 2012/29/EU, Articles 3-4.

<sup>1822</sup> PILPG Handbook, p. 25.

<sup>1823</sup> See e.g., Directive 2012/29/EU, Article 7.

<sup>1824</sup> SJAC Gender & SGBV Documentation Policy, p. 11; Murad Code, Principle 2.7.

It is important to note that, even when prior informed consent has been obtained, practitioners still have the ongoing responsibility of assessing the risk of harm to the person providing the information.<sup>1825</sup>

Finally, withdrawal of consent must be respected.<sup>1826</sup> Victims and witnesses must be made aware of their right to withdraw their consent to any aspect of the documentation process at any time (including during an interview), and how they can notify the practitioner of such a decision. Practitioners should inform the victim or witness on what they are able to do on withdrawal of consent, and what they may have limited control over (i.e., in the case of information already shared).<sup>1827</sup>

## **6.3 SHARING INFORMATION**

The preceding sections, ‘Do no harm’ and ‘Informed Consent’, are based on respect for a victim’s ability to freely make their own decisions. In order to empower and enable them to do so, it is important that practitioners establish a practice of pro-actively informing victims about their rights; their case; their safety and security (including any changes in the perpetrator’s custodial situation); and the progress of the documentation process, investigation or court proceedings, in a language the victim understands, and support them in making the best decisions they can. Information for the victim should be shared promptly, as early as possible, on an ongoing basis and in a manner that does not undermine any criminal proceedings (such as information about other victims, for example).

In particular, practitioners need to inform victims/witnesses if they intend to share any of their information with the ICC and/or the Ukrainian authorities, and obtain their informed consent to do so (*see* Section 6.2). Practitioners should also explain the criminal justice process in an accurate and clear manner, including the potential pitfalls involved in order to counter any unrealistic expectations a victim/witness might have about the potential trajectory of their case, their participation in the case and the possibility of obtaining any sort of reparation for the harm they have suffered. The following sections provide more information on victim participation and reparations at the ICC and in the Ukrainian criminal justice process.

### **6.3.1 Sharing Information on Victim Participation and Reparations Before the ICC**

‘Victims’ at the ICC are persons or entities who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.<sup>1828</sup> According to the ICC, an individual is considered a ‘victim’ if the following conditions are met: (i) his or her identity appears to have been duly established; (ii) the events described in the application for participation constitute one or more crimes within the jurisdiction of the Court with which the suspect has been charged; and (iii) the

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<sup>1825</sup> OHCHR, ‘Manual on Human Rights Monitoring: Chapter 11 – Interviewing’ (2011) HR/P/PT/7/Rev1, pp. 16-17.

<sup>1826</sup> Murad Code, Principle 2.10.

<sup>1827</sup> Murad Code, Principle 2.10.

<sup>1828</sup> ICC, Rules of Procedure and Evidence, reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York (3-10 September 2002)* ICC-ASP/1/3 and Corr.1 (‘ICC Rules of Procedure and Evidence’), Rule 85.

applicant suffered harm as a result of the commission of the crime(s) with which the suspect is charged.<sup>1829</sup>

Victims can apply to participate in the criminal proceedings before the ICC and may also be entitled to reparations.<sup>1830</sup> Both are discussed, in turn, below.

#### 6.3.1.1 *Victim Participation*

Where the personal interests of a victim have been affected during a situation under investigation by the ICC, the Court may “permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>1831</sup> The personal interests of a victim are considered to have been affected where they suffered harm (i.e., physical injuries, emotional suffering and economic loss) directly or indirectly, and there is a nexus between the harm suffered and the commission of a crime for which the perpetrator has been charged by the Court.<sup>1832</sup>

Accordingly, to participate in ICC proceedings, victims must make a written application to the ICC Registrar, who will transmit the application to the relevant Chamber.<sup>1833</sup> The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the victim’s application if it considers that the person is not a victim or that their personal interests have not been affected.<sup>1834</sup>

The application form for victim participation, as well as guidelines on how to complete the form, can be found on the ICC’s [website](#) (in English, Ukrainian and Russian, among other languages). It is also recommended that victims, or those acting on behalf of a victim, contact the ICC’s Victims Participation and Reparations Section (‘VPRS’), which can provide victims with all relevant information, forms and other assistance that may be required.<sup>1835</sup>

If a victim’s participation is accepted by the Court, their identity will not be disclosed during the proceedings. Instead, victims are referred to by a pseudonym attributed to them by the Court (for example, a/0001/18) so their names do not appear in the public domain.<sup>1836</sup>

The timing and manner of a victim’s participation is determined by the ICC judges depending on the stage of the proceedings. Examples of the ways in which a victim can participate in ICC proceedings

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<sup>1829</sup> *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019 (‘*Yekatom and Ngaïssona* Decision on Victims’ Applications for Participation’), para. 21; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-37-tENG, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 12 March 2020 (‘*Al Hassan* Victim’s Participation Decision’), para. 27.

<sup>1830</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 (‘Rome Statute’), Articles 68(3), 75.

<sup>1831</sup> Rome Statute, Article 68(3).

<sup>1832</sup> *Yekatom and Ngaïssona* Decision on Victims’ Applications for Participation, , para. 35.

<sup>1833</sup> ICC Rules of Procedure and Evidence, Rule 89(1).

<sup>1834</sup> ICC Rules of Procedure and Evidence, Rule 89(2).

<sup>1835</sup> The contact info of the VPRS is as follows: Address: Post Office Box 19519, 2500 CM, The Hague, Netherlands. Telephone number: +31 (0)70 515 95 55. Email: [VPRS.information@icc-cpi.int](mailto:VPRS.information@icc-cpi.int).

<sup>1836</sup> ICC, ‘Victims’.

include: being notified of submissions and decisions made in the relevant case; attending hearings and making oral submissions; filing written submissions; and/or questioning witnesses.<sup>1837</sup>

#### *6.3.1.1.1 Issues Facing Victims Seeking to Participate in ICC Proceedings*

However, when sharing information with victims about the ICC's victim participation regime it is crucial to create realistic expectations. As mentioned, victims must establish that they suffered harm from the crimes for which the particular perpetrator is accused (i.e., the crimes outlined in the decision confirming the charges).<sup>1838</sup> Accordingly, if an individual is a victim of a crime for which the perpetrator has not been charged, or of an incident that falls outside of the temporal, geographic or material parameters of the case, the victim will not be able to participate in the proceedings.<sup>1839</sup> This significantly limits the number of victims which will eventually be entitled to participate in proceedings before the ICC.

Moreover, the Situation in Ukraine is currently only in the investigation phase.<sup>1840</sup> Accordingly, individuals affected by the conflict in Ukraine hoping to participate in the proceedings before the ICC will have to wait until the investigation phase is complete and arrest warrants are issued to potential perpetrators in order to determine whether the crimes under which they have suffered fall within the parameters of the cases the ICC Prosecutor chooses to pursue.

#### *6.3.1.2 Reparations to Victims*

In addition to having the potential ability to participate in ICC proceedings, victims can also seek reparation (including restitution, compensation and rehabilitation) for the harm they have suffered.<sup>1841</sup> For the purposes of reparations, 'harm' refers to "hurt, injury and damage" and may be material, physical or psychological.<sup>1842</sup> Additionally, the harm does not necessarily need to have been direct, but it must have been personal to the victim.<sup>1843</sup> Accordingly, if there is a conviction at the end of a trial, the Trial Chamber may order the convicted person to pay reparations to the victims of the crimes of which the person was found guilty.<sup>1844</sup>

When assessing a reparations request, the Court will take into account the scope and extent of any damage, loss or injury, and may award reparations on an individual and/or collective basis, whichever it views as the most appropriate for the victims in the particular case.<sup>1845</sup> Victims or their legal representatives, or the convicted person, can also request the Court to appoint experts to assist

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<sup>1837</sup> ICC, 'Victims'. See also, Rome Statute, Article 15(3), 19(3), 68(3); ICC Rules of Procedure and Evidence, Rules 92(5), 92(6), 93.

<sup>1838</sup> *Yekatom and Ngaïssona* Decision on Victims' Applications for Participation, paras 21 and 35..

<sup>1839</sup> *Yekatom and Ngaïssona* Decision on Victims' Applications for Participation, paras 21 and 35; *Al Hassan* Victim's Participation Decision, para. 48.

<sup>1840</sup> ICC, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (2 March 2022).

<sup>1841</sup> Rome Statute, Article 75.

<sup>1842</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations, 3 March 2015 ('*Lubanga* Order for Reparations'), para. 10.

<sup>1843</sup> *Lubanga* Order for Reparations, para. 10.

<sup>1844</sup> Rome Statute, Article 75(2); ICC, 'Victims'.

<sup>1845</sup> ICC Rules of Procedure and Evidence, Rule 97(1).



it in determining the scope, extent of any damage, loss and injury to/in respect of the victims and to suggest various options concerning the appropriate types and modalities of reparations.<sup>1846</sup>

Collective and/or individual reparations may include monetary compensation, return of property, rehabilitation, medical support, victims' services centres or symbolic measures such as apologies or memorials.<sup>1847</sup>

#### *6.3.1.2.1 Issues Facing Victims Seeking Reparations through the ICC*

For victims to receive reparations, the ICC must first convict the accused of the crime(s) by which the victim was harmed.<sup>1848</sup> Accordingly, victims will have to wait what may be a considerable amount of time for an accused to be convicted as investigations into international crimes often take years, as do trials of the perpetrators whose presence the ICC is able to secure.<sup>1849</sup>

Not only does it take a substantial amount of time for perpetrators to be convicted at the ICC, but even after a conviction has been reached, there are further challenges relating to the actual implementation of reparations.<sup>1850</sup> Thus far, these challenges have included: issues delivering reparations to victims residing in countries where violence continues; the emergence of community tensions when some victims receive reparations while others do not; and a lack of funding for reparations (particularly given the fact that perpetrators are often found to have no identifiable assets to be seized and used for reparations).<sup>1851</sup>

Victims may also find themselves ineligible for reparations because of the way perpetrators and crimes are selected by the ICC Prosecutor.<sup>1852</sup> Accordingly, victims of crimes committed by perpetrators who are not tried before the ICC will not be eligible for reparations. In addition, even if the relevant perpetrator is tried by the ICC, the victim may nevertheless be ineligible for reparations if they are a victim of an attack or a crime that is not covered by the charges.<sup>1853</sup> For example, the *Ongwen* case only covered attacks related to four crime scenes (IDP camps in this case); therefore, the victims of similar crimes in different areas were ineligible for reparations.<sup>1854</sup> Similarly, the *Al Mahdi* case focused only on the crime of destruction of cultural property, not other violations that were perpetrated, such as sexual violence and murder.<sup>1855</sup>

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<sup>1846</sup> ICC Rules of Procedure and Evidence, Rule 97(2).

<sup>1847</sup> ICC, 'Victims'; Rome Statute, Articles 75, 79. *See also*, *Lubanga* Order for Reparations, paras 33-43.

<sup>1848</sup> Rome Statute, Article 75(2).

<sup>1849</sup> L. Moffett, 'Reparations at the ICC: Can it Really Serve as a Model?' (*JUSTICEINFO*, 19 July 2019).

<sup>1850</sup> L. Moffett, 'Reparations at the ICC: Can it Really Serve as a Model?' (*JUSTICEINFO*, 19 July 2019).

<sup>1851</sup> L. Moffett, 'Reparations at the ICC: Can it Really Serve as a Model?' (*JUSTICEINFO*, 19 July 2019); L. Moffett and C. Sandoval, 'Tilting at windmills: Reparations and the International Criminal Court' (2021) 34 *Leiden Journal of International Law* 749 (Moffett and Sandoval, 'Reparations and the ICC'), p. 767-768.

<sup>1852</sup> Moffett and Sandoval, 'Reparations and the ICC', pp. 751-752.

<sup>1853</sup> L. Moffett, 'Reparations at the ICC: Can it Really Serve as a Model?' (*JUSTICEINFO*, 19 July 2019); Moffett and Sandoval, 'Reparations and the ICC', p. 752.

<sup>1854</sup> L. Moffett, 'Reparations at the ICC: Can it Really Serve as a Model?' (*JUSTICEINFO*, 19 July 2019).

<sup>1855</sup> L. Moffett, 'Reparations at the ICC: Can it Really Serve as a Model?' (*JUSTICEINFO*, 19 July 2019).

### **6.3.2 Sharing Information on Victim Participation and Compensation in the Ukrainian Criminal Justice Process**

During the criminal justice process in Ukraine, an individual obtains victim status either after filing a complaint about a crime or issuing a separate request to an investigator or prosecutor.<sup>1856</sup> Under the CPC, victims are provided a broad set of rights, including the right to participate in, and be aware of the progress of, the criminal proceedings.<sup>1857</sup> For example, victims have the right to present evidence to an investigator, prosecutor, judge or investigative judge, and to challenge their decisions or requests.<sup>1858</sup>

Pursuant to Article 56(1)(10) of the CPC, individuals are also entitled to obtain compensation for damage resulting from the crime of which they are a victim. However, currently obtaining compensation from a convicted person for the damage caused by their crime is often impossible, and there is no special fund for victims of violent/conflict-related crimes.<sup>1859</sup>

## **6.4 CONFIDENTIALITY**

Confidentiality is not just an ethical obligation – it is a legal imperative<sup>1860</sup> and an operational necessity. Confidentiality requires practitioners to protect not only the information they gather about victims throughout all stages of the documentation process, but to protect their privacy.<sup>1861</sup> It is an important means of avoiding safety and security risks, secondary and repeat victimisation, intimidation, retribution and retaliation, and stigmatisation,<sup>1862</sup> and is particularly important in dealing with vulnerable categories of victims. Protecting confidentiality ensures safety and security, promotes trust<sup>1863</sup> and empowerment, and will be a key step in getting victims to disclose information or testify.

Concerns about confidentiality, safety and security will vary from individual to individual and will be highly context specific. By way of example, specific confidentiality concerns may arise due to certain intersectional factors, such as those relevant to the victims/witnesses' sexual orientation, gender identity, HIV/AIDS status, membership in a marginalised racial or ethnic group, or due to them being a sex worker, undocumented migrant or victim of human trafficking. Victims of CRSV crimes may have particular concerns about information being shared, including negative consequences such as retaliation by family members or the local community, coercive pressure to marry assailants or lie about what happened, etc. (*see* Section 7.6).<sup>1864</sup>

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<sup>1856</sup> CPC, Article 55(2).

<sup>1857</sup> CPC, Article 56.

<sup>1858</sup> CPC, Article 56(3), 56(7).

<sup>1859</sup> EUAM Ukraine, 'Why victims of crime suffer twice in Ukraine' (28 March 2019).

<sup>1860</sup> PILPG Handbook, p. 28; OHCHR Manual on Human Rights Monitoring: Chapter 2, p. 6. .

<sup>1861</sup> PILPG Handbook, p. 24.

<sup>1862</sup> Directive 2012/29/EU, preamble, para. 54, Article 21.

<sup>1863</sup> PILPG Handbook, p. 28; Amnesty International and CODESRIA, 'Monitoring and Reporting Human Rights Violations in Africa – A Handbook' (Ukweli Series, 2000) ('Ukweli Handbook'), p. 35.

<sup>1864</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 95.

Nonetheless, practitioners must inform victims/witnesses that there are limits to confidentiality (this should be clearly explained to the victim or witness, and their informed consent to continue with the process should be obtained).<sup>1865</sup> For example, the information may subsequently be disclosed to the ICC and/or Ukrainian authorities for use in a criminal trial, which will limit your ability to control its confidentiality.<sup>1866</sup>

Both the ICC and the Ukrainian authorities have measures to keep information confidential from the public, particularly where the victim is vulnerable and in need of protection.<sup>1867</sup> These measures include, among others, the use of a pseudonym, voice distortion or conducting the trial *in camera* (i.e., in private). However, the implementation of these measures is at the discretion of the prosecutor or judge and should not be expected.<sup>1868</sup> Additionally, once information is passed onto the ICC or the Ukrainian authorities, these authorities have control over that information, and evidence is generally subject, at some stage, to disclosure to other organs of the court, i.e., the judges or the defence.<sup>1869</sup> Accordingly, practitioners must explain this to the victim/witness and obtain their prior informed consent to hand their information over to the ICC or the Ukrainian authorities.

Practitioners should also ensure that victims/witnesses are aware that any public media reporting of the trial (which may cover the testimony they provide), may still identify them, even when confidentiality measures have been implemented. For example, the disclosure of multiple attributes, though seemingly unattributable on their own, could aggregately identify a victim/witness who wishes to remain anonymous.

Confidentiality concerns and measures to protect personal data and information must be discussed with the victim/witness when attempting to gain their informed consent for their participation in the documentation process and any ongoing activities (*see* Section 6.2). This requires practitioners to:<sup>1870</sup>

- **Ask** the victim or witness if they have any specific concerns or suggestions regarding confidentiality;
- **Explain** the conditions and limitations of confidentiality and ensure that the victim or witness gives their informed consent as to how the information may be used. In particular, as mentioned above, the possibility of disclosure to criminal justice authorities or investigative mechanisms (whether national or international), and what this means for confidentiality of information should be explained;
- Ensure the victim or witness **understands** the risks of providing information and **provide** information about procedures in place in the event of a potential security breach; and
- **Ask and agree with** the victim or witness how they would like confidentiality to be approached, including any specific concerns or measures they would like to be implemented

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<sup>1865</sup> PILPG Handbook, pp. 28-29.

<sup>1866</sup> PILPG Handbook, p. 29.

<sup>1867</sup> Rome Statute, Article 54(3)(d) and (f); ICC Rules of Procedure and Evidence, Rule 82; CPC, Articles 14, 56(12); Law of Ukraine No. 3782-XII, Article 7.

<sup>1868</sup> Rome Statute Article 54(3)(e).

<sup>1869</sup> ICC Rules of Procedure and Evidence, Section II of Chapter 2; CPC, Article 290.

<sup>1870</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 95-96.

(e.g., how they would like to be contacted in a way that respects their privacy, where they would like interviews to take place and how they would like to be approached in public, if at all).

## 6.5 REFERRALS

Wherever possible, practitioners should establish pathways to social and other support networks to facilitate victim access.<sup>1871</sup> Referrals may need to occur prior to participation in the documentation process, for example, when the victim requires immediate medical, psychological or security assistance. This may be particularly relevant in areas of Ukraine where hostilities are occurring or areas where there is a high number of refugees/IDPs who may require urgent assistance. Referrals may also need to occur after interacting with the documentation process if it has been emotionally difficult, traumatic or puts the victim/witness at additional risk.<sup>1872</sup> Women who have been raped may require access to safe and non-judgmental abortion services.

**Referrals should never be dependent on participation in the documentation or justice process.**<sup>1873</sup>

Support services should be confidential and discrete.<sup>1874</sup> Referral pathways should be identified based on the individual characteristics and needs of the victim/witness.<sup>1875</sup> Referral services should be neutral and independent.<sup>1876</sup>

Wherever possible, victims of sexual violence should be enabled to access services facilitating their recovery from sexual violence, from the first stages of documentation,<sup>1877</sup> throughout and after any criminal proceedings.

Best practice suggests that when practitioners engage with victims of rape and other acts of sexual violence, they do so knowing what discrete formal and informal social, legal, medical services and other services are available for the victim in order to ensure they provide the most suitable referral options.<sup>1878</sup> For instance, the web-site of the National Social Service of Ukraine provides a list of specialised support services for victims of gender-based violence available in each Ukrainian region.<sup>1879</sup> Additionally, local CSOs, such as La Strada Ukraine, have infographics explaining how cases of sexual violence are documented and which social services provide assistance to victims of

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<sup>1871</sup> Directive 2012/29/EU, Article 8(2); Istanbul Convention, Article 56(1)(c); International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 98; Istanbul Convention Explanatory Report, paras 138-142; Alberta Justice and Solicitor General, Sexual Violence Police Advisory Subcommittee, 'Best Practice Guide for Law Enforcement Investigations into Sexual Violence' (2018), p. 10; Hate Crimes Training Curricula, pp. 51, 56.

<sup>1872</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 98.

<sup>1873</sup> Directive 2012/29/EU, Article 8(5).

<sup>1874</sup> Directive 2012/29/EU, Article 8(3); Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 52.

<sup>1875</sup> OHCHR Lessons Learned, pp. 4-5.

<sup>1876</sup> OHCHR Lessons Learned, p. 4.

<sup>1877</sup> Directive 2012/29/EU, Article 8(1); Istanbul Convention, Articles 18(2), 20; Hate Crimes Training Curricula, pp. 51, 56.

<sup>1878</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 99; Istanbul Convention Explanatory Report, paras 111-123.

<sup>1879</sup> 'Specialized support services for victims of domestic and gender-based violence' (*National Social Service of Ukraine*).

sexual violence.<sup>1880</sup> Finally, there is also a national hotline for prevention of domestic violence, human trafficking and gender-based discrimination which can provide, among others, informational and psychological consultations to victims.<sup>1881</sup>

## 6.6 PRINCIPLES RELATING TO WITNESS INTERVIEWS

This section provides an overview of the survivor-centred best practices that should be followed when interviewing a victim or witnesses. Gathering testimony from a witness is a highly specialised activity that involves a range of legal, ethical, psychological and security issues. Interviewing victims and witnesses without adhering to basic standards may undermine the integrity of evidence and any future prosecution, as well as lead to further traumatisation or victimisation on the part of the victim or witness.<sup>1882</sup> It is essential to avoid over-documentation of victims and witnesses by taking unnecessary repeat interviews.

Conducting interviews is highly specialised and requires significant training and expertise. **Only practitioners who are confident of their own training and competences should conduct witness interviews.** You should not interact with victims or witnesses, or conduct interviews, if this could cause additional and unnecessary harm. Always ask yourself whether the interview is needed or whether the information could be gathered from other sources.

It is necessary to choose between creating a witness statement or a witness summary when gathering the testimony of victims or witnesses. It is recommended that **only professionally trained practitioners gather witness statements.** A witness statement, signed by the witness and written in the first person, is considered to ‘belong’ to the witness and can be submitted as evidence in court.

If later statements or accounts by that witness are materially different from a previous statement, they may be used in court to impeach (i.e., challenge) the reliability of the witness’s account. Thus, improper interaction with a victim/witness and badly recorded witness statements could also potentially affect the ability of future prosecutors to use that evidence before accountability mechanisms.<sup>1883</sup>

Where it is not absolutely necessary or appropriate to take a witness statement, but interviewing the victim/witness remains necessary due to objective fears that information may be lost or deteriorate (e.g., there is no real prospect of a prompt investigation by international or national authorities or courts, or the witness is elderly or sick), **practitioners should collect witness summaries.** Witness summaries belong to the practitioner, rather than the witness, and thus have limited impeachment value in court. Whereas witness statements are recorded in the first person, a witness summary is a record of the interviewer’s notes in the third person and without the signature of the interviewee.<sup>1884</sup>

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<sup>1880</sup> Infographics: ‘Documentation of cases of sexual violence’ (*La Strada-Ukraine Facebook page*, 24 March 2022).

<sup>1881</sup> CoE, ‘Helplines in Europe’ (accessed 27 April 2022).

<sup>1882</sup> M. Nystedt (ed), C.A. Nielsen and J.K. Kleffner, ‘A Handbook on Assisting International Criminal Investigations’ (Folke Bernadotte Academy and Swedish National Defence College 2011) (‘Nystedt et al., Handbook’), p. 68.

<sup>1883</sup> *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 161; Nystedt et al., *Handbook*, p. 68.

<sup>1884</sup> *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 165.

A witness *summary* should record only a broad summary of the witness's testimony. This will preserve the main aspects of the testimony and provide future investigators and prosecutors with sufficient material to conduct a more formal interview, gather other information or obtain evidential leads.

### 6.6.1 **Survivor-centred Best Practices in Interviewing: the PEACE Methodology**

The PEACE<sup>1885</sup> methodology is internationally accepted as an effective interview model that can be used with a wide range of interviewees in all types of interview situations. The PEACE interview methodology incorporates the principle of 'Do no harm'.

The model is broken up into five stages from which its acronym is derived: (i) Planning and Preparation; (ii) Engage and Explain; (iii) Account; (iv) Closure; and (v) Evaluation.<sup>1886</sup>

#### 6.6.1.1 ***Planning and Preparation***

A successful interview needs to be adequately planned, prepared and structured.<sup>1887</sup> This has the potential to empower victims and lead to a more fully developed documentation process.<sup>1888</sup>

##### 6.6.1.1.1 ***Do you Need to Interview?***

As a first step, practitioners should assess the state of the documentation and/or investigative activities already undertaken, and determine whether they need to conduct the interview.<sup>1889</sup> As described above (*see* Section 6.1), 'Do no harm' involves practitioners taking measures to avoid unnecessary, repeated interviews and multiple statements.<sup>1890</sup> This will be particularly relevant in regard to those living in the newly liberated areas in Ukraine and for refugees who have fled areas under the control of Russia, who may be interviewed multiple times by different authorities, CSOs and journalists. Practitioners should therefore ask themselves whether the information of the identified witness is needed,<sup>1891</sup> and, where the witness has been interviewed previously, what added benefit interviewing again will bring, in light of the recognition that multiple interviews can result in additional trauma to victims and witnesses.<sup>1892</sup>

##### 6.6.1.1.2 ***Making Contact***

The chosen method of approach will likely flow from the risk assessment. Practitioners should consider if they have sufficient information on how they can safely, securely and *discretely* contact or approach their interviewee in a manner designed to attract as little attention as possible<sup>1893</sup> in order

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<sup>1885</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 163; PILPG Handbook, pp. 97-98.

<sup>1886</sup> M. Schollum, 'Review of Investigative Interviewing – Investigative Interviewing: The Literature' (New Zealand Police, September 2005), pp. 43 *et seq.*

<sup>1887</sup> PILPG Handbook, pp. 23, 98.

<sup>1888</sup> *See, e.g.*, OSCE Investigation Manual For War Crimes, Crimes Against Humanity And Genocide In Bosnia And Herzegovina, pp. 189, 192.

<sup>1889</sup> ICTY Manual on Developed Practices, para. 48.

<sup>1890</sup> Directive 2012/29/EU, Article 20(b); ICTY Manual on Developed Practices, para. 57.

<sup>1891</sup> ICTY Manual on Developed Practices, para. 48.

<sup>1892</sup> Murad Code, Principles 4.8-4.9.

<sup>1893</sup> ICTY Manual on Developed Practices, para. 49.



to avoid putting that interviewee or anyone else at risk, which might arise through something as simple as eavesdropping.

#### 6.6.1.1.3 *Planning the Interview*

Effective interview planning requires practitioners to know their interviewee.<sup>1894</sup> This means having a familiarity with their: age; literacy; personal and family situation; home environment; religion or faith (in order to take time for prayer into account); ethnicity; physical and mental health; sexual orientation; any disability which might affect the risk assessment; and the agreed strategy for handling their privacy, safety and security, and presenting their information.<sup>1895</sup>

A first step in developing the interview plan will be for practitioners to look at what has been alleged: the nature of the crimes; what the charges (or potential charges) are; the key elements of those offences; and what is needed to satisfy those elements (*see* Section 3.2).<sup>1896</sup>

Practitioners should accept that their information may not be complete and identify any gaps in the information which could be filled by the witness. They should ask themselves, for example, whether aggravating circumstances have been examined; whether checks have been made into whether the violence was, or is, systematic; and/or whether, in sexual violence cases, the existence of coercive circumstances has been sufficiently explored.

Based on their research, practitioners should decide what the aims and objectives of the interview are<sup>1897</sup> and should prepare the interview plan accordingly, including: the range of topics to be covered; points necessary to prove the elements of the alleged crimes; any potential defences; and lead evidence (among others).<sup>1898</sup>

All necessary documents or other potential items that might be needed during the interview should be prepared in advance.<sup>1899</sup> In addition, a tentative outline of questions should be drawn up, which may seek to elucidate:<sup>1900</sup>

- (i) Personal information about the victim/witness;
- (ii) The date, time, location and other circumstances of the crime;
- (iii) The description of the incident;
- (iv) The description of the injuries sustained during an act; and
- (v) Any information about the alleged perpetrator.

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<sup>1894</sup> UK College of Policing, 'Investigative Interviewing' (2013) ('UK College of Policing Investigative Interviewing'); Association of Defence Counsel Practising Before the International Courts and Tribunals ('ADC-ICTY'), 'Manual on International Criminal Defence: ADC-ICT Developed Practices Within the Framework of the War Crimes Justice Project' (2020), p. 56.

<sup>1895</sup> UK College of Policing Investigative Interviewing.

<sup>1896</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 125.

<sup>1897</sup> UK College of Policing Investigative Interviewing.

<sup>1898</sup> UK College of Policing Investigative Interviewing.

<sup>1899</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 164-166; Women's Initiatives for Gender Justice ('WIGJ'), 'Gender in Practice: Guidelines & Methods to address Gender Based Crime in Armed Conflict' (2005) ('WIGJ Gender in Practice'), p. 38; PILPG Handbook, p. 98.

<sup>1900</sup> This is by no means an exhaustive list. *See also, for e.g.*, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 165; WIGJ Gender in Practice, pp. 39-46.

Practitioners may also consider arranging for another person to take notes during the interview to allow them to fully focus on the victim's/witness's story whilst also having an accurate record of their account of events.<sup>1901</sup> It is important that the interviewers agree on their respective roles and maintain those during the interview.<sup>1902</sup>

#### 6.6.1.1.4 *Interview Location and Environment*

Each witness should be interviewed separately and in the absence of other witnesses. The location of the interview must be carefully considered.

A victim-centred approach guided by international best practice and the principle of 'Do no harm' would be, wherever possible, to provide safe, private interview spaces.<sup>1903</sup> Practitioners should consider how a victim or witness is going to perceive the interview location and its surrounding environment. In doing so, they might consider whether:

- (i) The location is discreet;<sup>1904</sup>
- (ii) It is an environment where they are and feel safe to speak freely (not only during the interview, but on arriving and leaving);<sup>1905</sup>
- (iii) The interview is located in an area where the interviewee feels safe (i.e., there is no risk of the location coming under attack, the interviewee can travel to the location safely, the interviewee won't be at risk of being stopped or discovered by hostile forces/authorities when traveling to or from the interview, etc.); and
- (iv) The location is free of other people who will recognise the interviewee, or people who can see or hear your conversation.

The timing/ease of access/distance of the location for the interviewee should also be considered,<sup>1906</sup> especially given that, for those with confidentiality concerns, their travel to the interview location, or interaction with unfamiliar individuals at their home may reveal their identity.

#### 6.6.1.1.5 *Parent/Guardian/Support Person Presence During the Interview*

Interviewees should be asked whether they would like to have a support person present during the interview.<sup>1907</sup> This should be someone the victim trusts,<sup>1908</sup> but preferably not a witness or potential witness. In certain sexual violence cases where practitioners suspect coercive circumstances or incidents of domestic violence, this support person should not be a member of the interviewee's

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<sup>1901</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 165.

<sup>1902</sup> UK College of Policing Investigative Interviewing.

<sup>1903</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 165.

<sup>1904</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 165, 239.

<sup>1905</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 165, 239; Canadian Framework for Collaborative Police Response on Sexual Violence, p. 16; Ukweli Handbook, p. 38.

<sup>1906</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 165.

<sup>1907</sup> Directive 2012/29/EU, Article 20(c); Ukweli Handbook, p. 66; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 166-167.

<sup>1908</sup> CoE, 'Preventing and Combating Domestic Violence Against Women, a Learning Resource for Training Law Enforcement and Justice Officers' (January 2016), p. 43; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 167.

family. The presence of a guardian or caregiver may be required for persons who are underage, ill, elderly or with certain disabilities.

While the support person should have no part in the interview, and only be present during the *Engage and Explain* phase (see Section 6.6.1.2),<sup>1909</sup> there may be cases where a lawyer may need to be present during the interview. This may arise in interviews of perpetrators or insiders (such as a fellow soldier within the same unit, for example). If this is the case, the witness's lawyer may need to be present for the entire interview.

#### 6.6.1.1.6 *Recording the Interview*

Practitioners should decide whether or not they need to record the interview. While audio or video recording is a more reliable method of documentation, depending on the circumstances of the interview, they may consider taking notes instead.<sup>1910</sup>

#### 6.6.1.1.7 *Potential Confidentiality of Information/Safety and Security Issues*

The parameters and limits of confidentiality should be explained to the witness in a manner and language that they understand before any information is put on the record (see Section 6.4).<sup>1911</sup> Witnesses may be extremely unwilling to speak out about what happened to them, particularly in the Ukrainian context. It will likely only be by conducting an interview that the practitioner can determine whether the interviewee has legitimate safety and security concerns.<sup>1912</sup> If, during the interview, the victim discloses a credible threat of violence or violent acts of revenge by the perpetrator, practitioners should know what their response is going to be in advance.

If the witness is vital to the documentation process, and the security concerns are legitimate, practitioners should make sure they know what protective measures are available to the witness and explain those to them (see Section 6.1.4).<sup>1913</sup>

#### 6.6.1.2 *Engage and Explain*

This is the first phase of the actual interview. The purpose of this step is to create a positive atmosphere, develop trust, encourage conversation and secure informed consent (see Section 6.2). Prior to the interview, the victim's or witness's rights should be explained, as well as the way in which the interview will be conducted.

Practitioners should create an environment that encourages people to talk. Attention should be paid to seating arrangements,<sup>1914</sup> and the layout of the room should be open and unthreatening. This gives the interviewee power and shows them respect. Pay attention not to mirror the unequal power

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<sup>1909</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 167.

<sup>1910</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 164-165; S.J. Archambault and K.A. Lonsway, 'Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault' (February 2006, updated June 2019), pp. 45-47.

<sup>1911</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 95.

<sup>1912</sup> ICTY Manual on Developed Practices, para. 50.

<sup>1913</sup> ICTY Manual on Developed Practices, p. 65.

<sup>1914</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 166.

relationship within which the crime took place. This is particularly relevant for victims who might have been subject to detention, torture, rape or other forms of sexual violence. During the interview, interviewees should be asked if they are comfortable and whether they would like to have anything removed or changed (including the interviewer).<sup>1915</sup> Practitioners should make every possible effort to ensure interviewees feel comfortable and secure in whatever environment they are able to create.

It should be explained to the interviewee that they have control over the situation, and can stop the interview, take a break or terminate their participation in the process at any time.<sup>1916</sup> Interviewers should realise that the interview may be the first time that the interviewee has recounted the incident and should be prepared for them to become distressed or display symptoms of post-traumatic stress disorder.<sup>1917</sup>

It is during this phase where practitioners can obtain informed consent. Part of this involves practitioners introducing themselves and explaining why they are there and what the objectives of the interview are.<sup>1918</sup>

Interviewees should be told why it is important for the practitioner to listen to what they have to say. Practitioners should ask (if they do not already know) whether the interviewee has made previous statements or interviews, and with whom these topics have been discussed.<sup>1919</sup> If the witness has spoken with anyone about the incident in question, this may provide an additional potential witness. If interview preparation has been done properly, practitioners should be able, at this point, to explain the nature of the questions.<sup>1920</sup> This is also part of informed consent.<sup>1921</sup> Questions about sexual violence, for example, are very intimate and may be difficult for victims to discuss as they may create feelings of embarrassment or shame. In certain communities, these feelings may be amplified.<sup>1922</sup> In these situations, practitioners should help the victim or witness to deal with feelings of shame and guilt by reinforcing that they are not to blame.<sup>1923</sup>

Practitioners should discuss whether and how they may record the interview, and explain how the information might be used, including the possibility of its disclosure if the victim or witness testifies in a criminal case (*see* Section 6.3).<sup>1924</sup> Best practice suggests that practitioners should have the victim repeat this back to ensure they fully understand the consequences of sharing information.<sup>1925</sup>

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<sup>1915</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 169.

<sup>1916</sup> SJAC Gender & SGBV Documentation Policy, p. 11; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 179-180; PILPG Handbook, pp. 33, 102.

<sup>1917</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 235; WIGJ Gender in Practice, pp. 36, 59-63.

<sup>1918</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 169; PILPG Handbook, pp. 25, 101; Ukweli Handbook, p. 67.

<sup>1919</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 170.

<sup>1920</sup> PILPG Handbook, p. 101.

<sup>1921</sup> PILPG Handbook, p. 25.

<sup>1922</sup> Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 18.

<sup>1923</sup> WIGJ Gender in Practice, p. 36.

<sup>1924</sup> WIGJ Gender in Practice, p. 34.

<sup>1925</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 168

Interviewees should be advised to tell the truth, and to clarify that they understand what it means to tell the truth. They should be invited to tell the interviewer if they don't understand any of the questions and to ask clarifying questions or correct them if they have got something wrong.<sup>1926</sup> Witnesses and victims should also be advised on the criminal liability they can incur for giving knowingly false testimony.<sup>1927</sup>

### 6.6.1.3 Account

As part of the eventual interview, witnesses should be allowed to review previous statements to refresh their memory. They may wish to correct, change or adopt that previously recorded information. In this way, practitioners may be able to limit the risk of re-traumatisation by only asking additional, clarifying questions. This will help in obtaining the fullest, most coherent account of the crimes.

Practitioners should be good, attentive listeners, as displayed through their posture and body language, because it is important to avoid creating an atmosphere of intimidation. Attention should be paid to facial expressions, e.g., by avoiding expressions of disbelief or judgement.<sup>1928</sup> Listening attentively will allow interviewers to recognise changes in behaviour (such as fear, discomfort, embarrassment or reluctance). This should be treated as a signal that the process needs to be adjusted, for example, by stopping, changing the subject or taking a break. An attentive listener also better remembers details and can show their interest by paraphrasing/repeating/summarising the information they have received. Where interviews are conducted as part of a team, co-interviewers should be briefed to act in a similar manner.

#### 6.6.1.3.1 Narrative

Practitioners should first seek to get a broad account from the victim/witness of what happened by allowing the interviewee to provide an uninterrupted narrative of the events. Questioning should start broad, and then move to the specific.

Appropriate language and terminology should be used during the interview and practitioners should remember to phrase the questions in a manner that allows the full experience of the victim to be shared. There may be different cultural ways of framing questions and answers.<sup>1929</sup> In sexual violence cases, for example, consider using accessible language to describe the sexual activities and sexual body parts<sup>1930</sup> to avoid confusion or misunderstandings (*see* Section 7.7.1).

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<sup>1926</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 172.

<sup>1927</sup> CPC, Articles 67, 224(3), 224(9).

<sup>1928</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 180; GBV Pocket Guide, p. 18.

<sup>1929</sup> *See e.g.*, UK College of Policing Investigative Interviewing; Anti-Torture Initiative, Association for the Prevention of Torture, Norwegian Centre for Human Rights, 'Principles on Effective Interviewing for Investigations and Information Gathering' (May 2021) ('Principles on Effective Interviewing for Investigations and Information Gathering'), paras 132-141; Ukweli Handbook, p. 69.

<sup>1930</sup> WIGJ Gender in Practice, pp. 36-37.

Language should be clear and accessible, and questions should be short, simple, and open-ended.<sup>1931</sup> These tend to be the ‘who/what/where/when/and how do you know’ questions, or the ‘TEDS’ questions:<sup>1932</sup>

TEDS	
<b>Tell</b>	Could you <b>tell</b> me exactly what happened?
<b>Explain</b>	Could you <b>explain</b> to me what happened afterwards?
<b>Describe</b>	Could you <b>describe</b> to me what that person looked like?
<b>Show</b>	Could you <b>show</b> me on the map where this happened?

Practitioners should work to ‘funnel information’, starting with broad questions and then getting more specific.<sup>1933</sup> The following types of questions should be avoided: leading (e.g., “He hit you, didn’t he?”), compound (e.g., “What did they look like and what did they say?”), closed (e.g., “Did he shoot?”) and forced-choice (e.g., “Were the uniforms green or blue?”).<sup>1934</sup> These questions tend to result only in limited or yes/no answers. When dealing with cases of sexual violence, questions such as “Why didn’t you leave?” or “Why didn’t you know?” are victim-blaming and should be avoided in all circumstances.<sup>1935</sup>

Practitioners should avoid interrupting the interviewee, as such interruptions can negatively impact memory recall and cause them to miss critical information.<sup>1936</sup> Topic-hopping (moving rapidly from one topic to another and back again) should also be avoided.<sup>1937</sup>

#### 6.6.1.3.2 *Expand, Clarify and Challenge*

After the victim/witness has provided their uninterrupted narrative of events, practitioners should seek to expand upon and clarify or challenge aspects of their account, where necessary. Practitioners can expand the victim’s/witness’s narrative by focusing on:<sup>1938</sup>

- **PLAT:**
  - **People**
  - **Locations**
  - **Actions**
  - **Time**

<sup>1931</sup> PILPG Handbook, pp. 33, 104; Principles on Effective Interviewing for Investigations and Information Gathering, para. 33; Ukweli Handbook, p. 68.

<sup>1932</sup> PILPG Handbook, p. 105. *See also*, UK College of Policing Investigative Interviewing.

<sup>1933</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 172.

<sup>1934</sup> PILPG Handbook, pp. 32-33, 103-104; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 175; UK College of Policing Investigative Interviewing.

<sup>1935</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 172, fn. 4.

<sup>1936</sup> UK College of Policing Investigative Interviewing; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 172.

<sup>1937</sup> UK College of Policing Investigative Interviewing.

<sup>1938</sup> IICI, Field Handbook, p. 19.



- **ADVOKAT:**

- Amount of time the witness was there
- Distance from the events
- Visibility
- Obstructions to view
- Known or seen the persons before
- Any specific reason to remember
- Time lapse since the event
- Errors

If a victim or witness says something that is inconsistent with something that they have said earlier or something different from a fact established during the documentation process, practitioners should not assume that those inconsistencies must be eradicated – they are sometimes indications of reliability and credibility, and not the opposite. Inconsistencies may arise for many reasons, depending on the victim’s individual context. Inconsistent testimonies are not necessarily false testimonies.<sup>1939</sup>

Sources of inconsistencies and contradictions may range from the victim’s lack of understanding of what happened, to trauma-caused incapacity to recollect and describe the events, to lack of culturally appropriate vocabulary of sexual violence or different vocabularies employed by a victim, an interpreter and a criminal justice actor.<sup>1940</sup>

Victims/witnesses may be confused about facts, dates, times, locations or have trouble remembering many of these details. Their memory may be affected by the trauma of the incident in question. They may also not be able to recall things in a linear way. Practitioners can remedy this by altering the framing of their questions (i.e., by asking “What else happened?” instead of “What happened next?”).<sup>1941</sup> Additionally, victims may alter their narrative because they fear retaliation; are ashamed, embarrassed or in shock; or want to avoid stigma, re-victimisation or meet the requirements of their culture, traditions and societies.<sup>1942</sup> They may also offer only partial accounts; attempt to misdirect the documentation process; and omit mentioning the presence of other victims, witnesses or of attackers.

If there are inconsistencies, practitioners should clarify, rather than confront. The witness should be taken back through their story step-by-step and asked to clarify or explain why they believe events unfolded in the manner in which they describe. Questions could be posed in a different way in order to remedy the inconsistency,<sup>1943</sup> or interviewers can, for example, use specific closed questions such

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<sup>1939</sup> In *Kunarac et al.* for example, the Tribunal held that the inconsistencies did not “cast doubt” upon the witness’s credibility, and in fact, the lack of “[s]uch natural discrepancies could form the basis for suspicion as to the credibility of a testimony”. See, *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 309.

<sup>1940</sup> Office for Victims of Crime: Training and Technical Assistance Center, “Trauma-Informed Victim Interviewing” (accessed 27 April 2022) (“Trauma-Informed Victim Interviewing”).

<sup>1941</sup> Trauma-Informed Victim Interviewing.

<sup>1942</sup> S. McCarthy-Jones, ‘Survivors of Sexual Violence are Let Down by the Criminal Justice System – Here’s What Should Happen Next’ (*The Conversation*, 29 March 2018) (accessed 27 April 2022).

<sup>1943</sup> Ukweli Handbook, pp. 68-69.

as: “What words did he use?”, or “Where did this happen?”.<sup>1944</sup> If these steps still do not reconcile an inconsistency, it should be noted and interviewers should move on. Courts have accepted victim/witness testimony that has included inconsistencies, but in certain instances may only rely on part of the account for reliability purposes.<sup>1945</sup>

#### 6.6.1.3.3 *Basis for Knowledge*

Practitioners should take care to establish the basis for knowledge of every statement of fact made by the interviewee.<sup>1946</sup> The interviewee may be a survivor of the alleged crime, or they may have seen it or heard about it. If they heard about it, it should be established from whom, how and whether the incident is something everyone knew, something everybody was talking about or something reported on in the media or on social media.

#### 6.6.1.4 *Closure*

Concluding a victim/witness interview seldom marks the end of the documentation process. It is often only the beginning. Practitioners should not end interviews abruptly<sup>1947</sup> and should always choose a safe ending point.

Practitioners should establish how they will get in contact with the interviewee again, based on their preference, including alternative means of contact.<sup>1948</sup> It takes time to develop a relationship of trust and it may take more than one interview for a person to feel comfortable enough to discuss the details of the incidents being documented.<sup>1949</sup> Practitioners should ensure that the victim is aware that they can provide more information as they recall it.

Closure is a good time to re-confirm the interviewee’s informed consent<sup>1950</sup> for the interview or any information collected in its course to be used in the continuing documentation process, a professional investigation or an eventual prosecution. Interviewees should be given the option to revoke their consent<sup>1951</sup> and should understand that they are allowed to change their mind about their participation in the criminal justice process. They should also be told what will happen next and what they might be asked to do.<sup>1952</sup>

A discussion should take place regarding the interviewee’s needs and the available referral options (see Section 6.5).<sup>1953</sup> Practitioners should refrain from making promises that they cannot keep<sup>1954</sup> and should ensure that they do not promise benefits to the victim/witness (for example, free health care,

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<sup>1944</sup> UK College of Policing Investigative Interviewing; Ukweli Handbook, pp. 67-68.

<sup>1945</sup> See e.g., *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019, para. 80.

<sup>1946</sup> See e.g., Ukweli Handbook, pp. 33-34.

<sup>1947</sup> PILPG Handbook, p. 106.

<sup>1948</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 182.

<sup>1949</sup> PILPG Handbook, p. 33.

<sup>1950</sup> PILPG Handbook, p. 107.

<sup>1951</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 183.

<sup>1952</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 183.

<sup>1953</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 183; GBV Pocket Guide, pp. 11-12.

<sup>1954</sup> Ukweli Handbook, p. 70.

education or expenses beyond the cost of attending the interview).<sup>1955</sup> As far as possible, steps should be taken to ensure that the interviewee leaves in a relatively positive state of mind.<sup>1956</sup>

#### 6.6.1.5 Evaluation

The information obtained during the interview should be evaluated and practitioners should consider whether the interview has revealed any new or changed risks to the interviewee or any other person.<sup>1957</sup> Based on the interview, possible further lines of inquiry should be pursued<sup>1958</sup> and documentation strategies amended accordingly.

### 6.6.2 Interviewing Particularly Vulnerable Individuals

While the conflict in Ukraine has affected the population as a whole, some groups face specific threats and impacts, including women, children, older persons, persons with disabilities, national and ethnic minorities, LGBTQI+ people, human rights defenders/activists and IDPs/refugees.<sup>1959</sup> When documenting international crimes, practitioners should be cognisant of the special needs and problems faced by these groups,<sup>1960</sup> and the specific concerns these individuals may have when interacting with the criminal justice system. It is critical that the needs of these vulnerable persons are not overlooked or ignored,<sup>1961</sup> and that they are not subject to secondary traumatising during the criminal justice process because of discrimination or marginalisation.<sup>1962</sup> Practitioners are under an obligation not to treat those belonging to vulnerable groups less favourably than other people and to take their special needs into account.<sup>1963</sup> These needs may include specific referral pathways, heightened confidentiality or protective measures.

In addition to the above, the following sections outline specific steps that practitioners should employ while interviewing particularly vulnerable witnesses, such as children and the elderly or disabled individuals. Best practice when interviewing victims of sexual violence is considered in Section 7.

#### 6.6.2.1 Specific Guidance on Collecting Testimonial Information from Children

Generally, practitioners should not attempt to interview children unless they have expertise in doing so,<sup>1964</sup> as the risks of re-traumatisation are high. Accordingly, **practitioners should interview**

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<sup>1955</sup> PILPG Handbook, p. 36.

<sup>1956</sup> PILPG Handbook, p. 107.

<sup>1957</sup> PILPG Handbook, p. 108.

<sup>1958</sup> PILPG Handbook, p. 108.

<sup>1959</sup> OSCE, 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022' (2022) ('OSCE 'Report on Violations Committed in Ukraine since 24 February 2022'), p. 75.

<sup>1960</sup> OSCE 'Report on Violations Committed in Ukraine since 24 February 2022', p. 75.

<sup>1961</sup> OSCE 'Report on Violations Committed in Ukraine since 24 February 2022', p. 75.

<sup>1962</sup> International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49) 999 UNTS 171 ('ICCPR'), Article 26; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), ETS No.005, Opened for signature 4 November 1950 entry into force 3 September 1953 ('ECHR'), Article 14; Protocol No. 12 to the ECHR (4 November 2001), Article 1(1).

<sup>1963</sup> OSCE 'Report on Violations Committed in Ukraine since 24 February 2022', p. 75.

<sup>1964</sup> See, e.g., Murad Code, Principles 7.6.

**children, especially younger ones, only in exceptional circumstances** where the information they possess is critical and cannot be obtained through other means or sources. Additionally, this should only be done after a careful assessment of the child's best interest, which must always prevail.<sup>1965</sup>

That being said, children may have vital information for the justice process. They may themselves be victims, may have witnessed crimes committed against others, including their family members and friends, or may even have been involved in the commission of crimes.<sup>1966</sup> For the documentation of conflict-related violations to adequately capture the impact on children, children must be recognised as right holders on their own, and not simply seen as a fraction of the civilian population or a part of the broader narrative.

Indeed, following Russia's full-scale invasion of Ukraine on 24 February 2022, there have been numerous reports violations of international law committed against children. For example, in early April 2022, allegations emerged that Russia used local children as shields to avoid fire when retreating from areas around Kyiv and elsewhere, and that Russia took children hostage in a number of the conflict zones to ensure that locals would not disclose the Russian military's movements to the Ukrainian forces.<sup>1967</sup> In addition, civilian objects that were sheltering children, among other civilians, including a maternity hospital and a theatre with 'children' (дети) painted on the ground outside, have been targeted and destroyed by Russian air strikes.<sup>1968</sup>

Accordingly, children in Ukraine have not only witnessed the commission of various crimes but have also been made the specific target of such attacks and, thus, their testimony will be of particular importance when prosecuting these crimes. Nevertheless, while children can be important to conflict-related documentation processes, practitioners must follow a child-sensitive<sup>1969</sup> approach when interacting with child victims and witnesses of crime to ensure the child's best interests prevail. Such an approach should be undertaken in accordance with international best practice, relevant domestic standards and the following general principles of the rights of the child: non-discrimination; the best interests of the child; the right to life, survival and development; and the right to express one's views and have them considered.<sup>1970</sup>

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<sup>1965</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 ('CRC'), Article 3(1).

<sup>1966</sup> ICC, 'Policy on Children' (November 2016) ('ICC 'Policy on Children'), para. 17.

<sup>1967</sup> D. Boffey, 'Ukrainian Children Used as "Human Shields" Near Kyiv, Say Witness Reports' (*The Guardian*, 2 April 2022) (accessed 27 April 2022).

<sup>1968</sup> BBC, 'Ukraine War: Pregnant Woman and Baby Die After Hospital Shelled' (*BBC*, 14 March 2022) (accessed 27 April 2022); National Post, 'Russian Military Bombs Theatre With "Children" Painted on the Ground Outside It' (16/17 March 2022) (accessed 27 April 2022).

<sup>1969</sup> United Nations Economic and Social Council ('ECOSOC'), 'Resolution 2005/20: Guidance on Justice Matters involving Child Victims and Witness of Crimes' (22 July 2005) ('ECOSOC Resolution 2005/20'), para. 9(d): "[c]hild-sensitive" denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views". See also, Alliance for Child Protection in Humanitarian Action, 'Minimum Standards for Child Protection in Humanitarian Action' (2019), pp. 38-42: "Principles 1-4 [survival and development; non-discrimination and inclusion; children's participation; and the best interests of the child] are the key principles set out by the Convention on the Rights of the Child and are applicable to all humanitarian action."

<sup>1970</sup> UN Committee on the Rights of the Child, 'General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' (27 November 2003) UN Doc CRC/GC/2003/5, para. 12. See

This **child-sensitive approach**, in line with the aforementioned ‘Do no harm’ principle (see Section 6.1), is outlined as follows:<sup>1971</sup>

- Assess specific risks and factors such as their age and characteristics (age is an important determinant of their memory capacity), cultural and socio-economic environment, and particular vulnerabilities (such as displacement, personal trauma, health deterioration, physical and mental disabilities, etc.);<sup>1972</sup>
- Use age and developmentally appropriate language that the child understands;
- Adhere to the rights of the child under international law,<sup>1973</sup> including non-discrimination, dignity, privacy, the best interests of the child and the right of the child to express their views on all matters affecting them (and have those views listened to and taken into consideration);
- Engagement with children must be undertaken with due care and planning, including by undertaking psycho-social assessments, obtaining informed consent of the child’s parent/caregiver, assessing the relevance of potential information and identifying referral pathways prior to deciding whether to interview the child;
- The duty to provide true testimony should be explained to the child without the warning of criminal liability for providing knowingly misleading testimonies;<sup>1974</sup>
- Wherever possible, initial contact with the child should be established through an intermediary who has a relationship of trust with the child;
- Interviewers must be properly trained and must limit the number of individuals interacting with the children;
- Consider audio or video recording the interview with consent;
- Ask if the child has a preference for the gender of the interviewer or location. Create a child-friendly atmosphere which provides a safe space for the child to talk;
- Use interpreters who have received special training;
- Understand context-specific attitudes towards children (i.e., the kind of crimes, whether the child is a victim or witness) and the trauma they face;
- Remember that the mental and physical well-being of the child takes priority before the interests of the documentation process. Map suitable services in which children can potentially be referred for protection and support (including medical, social and psychological services); and

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also, ECOSOC Resolution 2005/20, para. 8: “professionals and others responsible for the well-being of those children must respect the following cross-cutting principles”: *Dignity; Non-discrimination; Best interests of the child*, which includes the right to *Protection and Harmonious development*; and *Right to participation*.

<sup>1971</sup> See, ICC ‘Policy on Children’, paras 22-34.

<sup>1972</sup> R.L. Listenbee, ‘Child Forensic Interviewing: Best Practices’ (US Office of Juvenile Justice and Delinquency Prevention, September 2015), pp. 3-6.

<sup>1973</sup> CRC; Declaration of the Rights of the Child (adopted 20 November 1959) A/RES/1386(XIV); UNODC, ‘Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary’ (2009).

<sup>1974</sup> CPC, Article 226(3).

- Ensure confidentiality by keeping private all the information obtained from child victims/witnesses in the course of the documentation process.

#### 6.6.2.2 *Elderly and the Disabled*

In situations of armed conflict, elderly persons and persons with disabilities (which includes impairments that are physical, mental, or both, and that individuals were born with or acquired later in life) are particularly vulnerable and face higher risk of harm and abuse.<sup>1975</sup> This vulnerability arises due to, among other things, reduced mobility, health problems and dependence on others for care. In addition, members of both groups are often discriminated against, which further contributes to their vulnerability. Nevertheless, such persons can act as vital sources of knowledge for the documentation of crimes committed in connection with an armed conflict. Accordingly, particular care must be taken by practitioners documenting crimes committed in Ukraine to ensure that they take into account the experiences of the elderly and the disabled while also taking care to consider their individualised needs in the process.

In working with the elderly and disabled, practitioners should:<sup>1976</sup>

- Ensure that they do not underestimate or overestimate the ability or stamina of the witness;
- Always respect the dignity of the witness;
- Conduct interviews in accessible locations, including, the victim's/witness's home for those who cannot travel or face barriers leaving their home;
- Consider and explain the accessibility of assistance services;
- Ensure that an independent support person is present. However, the practitioner must also ensure that this person does not answer the questions for the witness;
- Pay particular attention to maintaining confidentiality and protecting their privacy. In cases where older people and people with disabilities require a support person, such as a family member or caregiver, this may mean keeping the interview private from this person. This will require practitioners to support the person's right to make their own informed choices;<sup>1977</sup> and
- When relevant, provide sign language interpreters or people trained in augmentative/alternative communication (i.e., communication in whatever form is necessary to ensure the successful understanding of the practitioner's message, such as: speech; a shared glance; text;

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<sup>1975</sup> See e.g., HRC, 'Ukraine: Aged and Those with Disabilities Face Heightened Risks, Say UN Experts' (4 March 2022) (accessed 27 April 2022); HRW, 'No One is Spared: Abuses Against Older People in Armed Conflict' (23 February 2022) (accessed 27 April 2022); Age and Disability Consortium ('ADC'), 'Humanitarian Inclusion Standards for Older People and People With Disabilities' (2018) ('ADC, 'Humanitarian Inclusion Standards for Older People and People with Disabilities'); Handicap International, 'Disability in Humanitarian Contexts: Views from Affected People and Field Organisations' (2015); OHCHR, 'Older Persons Invisible and Vulnerable in Emergencies' (1 October 2019) (accessed 27 April 2022); UN Department of Economic and Social Affairs, 'Disability-Inclusive Humanitarian Action' (accessed 27 April 2022); IASC, 'Humanitarian Action and Older Person: an Essential Brief for Humanitarian Actors' (2008).

<sup>1976</sup> See e.g., ADC, 'Humanitarian Inclusion Standards for Older People and People with Disabilities', pp. 99-100.

<sup>1977</sup> ADC, 'Humanitarian Inclusion Standards for Older People and People with Disabilities', pp. 53-54.



gestures; facial expressions; touch; sign language; symbols; pictures; speech-generating devices; etc.).<sup>1978</sup>

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<sup>1978</sup> ADC, 'Humanitarian Inclusion Standards for Older People and People with Disabilities', pp. 107, 251.

## 7 DOCUMENTING CONFLICT-RELATED SEXUAL VIOLENCE CRIMES

Sexual violence is a form of gender-based violence; it is discriminatory and is a serious violation of human rights law.<sup>1979</sup> Conflict-related sexual violence (‘CRSV’) has been a feature of the war in Ukraine since 2014. International organisations and NGOs monitoring the situation in Ukraine have documented numerous CRSV cases, both in Donbas and Crimea, committed by both sides since the conflict began.<sup>1980</sup> Following Russia’s full-scale invasion of Ukraine on 24 February 2022, there have been increasingly numerous reports of the commission of CRSV by Russian soldiers.<sup>1981</sup>

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<sup>1979</sup> United Nations General Assembly (‘UNGA’) Declaration on the Elimination of Violence against Women (20 December 1993) A/Res/48/104 (‘Declaration on the Elimination of Violence against Women’), Article 1; Committee on the Elimination of Discrimination Against Women (‘CEDAW’), ‘General Recommendation No. 19: Violence Against Women’ (1992) A/47/38, para. 1; CEDAW ‘General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19’ (14 July 2017) CEDAW/C/GC/35 (‘CEDAW, General Recommendation No. 35’), paras 1, 14; *Egyptian Initiative for Personal Rights (‘EIPR’) and Interights v. Arab Republic of Egypt*, Decision, Communication No. 323/2006, African Commission On Human And Peoples’ Rights (‘ACHPR’), December 2011, paras 123-137; *Njemanze et al. v. Federal Republic of the Nigeria*, ECW/CCJ/JUD/08/17, Judgment, 12 October 2017, pp. 38, 41.

<sup>1980</sup> See e.g., OHCHR, ‘Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017’ (16 February 2017) (‘OHCHR, 16 February 2017 CRSV Report’), paras 7, 54, 62, 69, 35 and Annex I, pp. 36, 39, 40, 42, 45, 46. In 2017, CEDAW observed that “notwithstanding the underreporting of cases of sexual violence as a result of stigma and fear of reprisals, among other reasons, there is evidence of many cases of sexual violence in the conflict-affected areas”: CEDAW, ‘Concluding Observations on the 8th Periodic Report of Ukraine’ (9 March 2017) C/UKR/CO/8 (‘CEDAW, Concluding Observations on the 8th Periodic Report of Ukraine’), para. 14. See also, Amnesty International, ‘Not a Private Matter Domestic and Sexual Violence Against Women in Eastern Ukraine’ (2020) (Amnesty International, DSV Against Women in Eastern Ukraine’), pp. 60-67; In an interview, Yekateryna Levchenko, Government Commissioner for Gender Equality Policy, stated that there are thousands of victims of sexual violence in non-government controlled areas. See, T. Yarmoshchuk, “Rape as a method of torture”. Sexual crimes in the war zone in Donbas’ (*Nastoyashcheye Vremia*, 24 November 2020 (‘Yarmoshchuk, “Rape as a method of torture”’); H. Yanova and V. Shcherbachenko (eds), ‘War Without Rules: Gender-Based Violence in the Context of the Armed Conflict in Eastern Ukraine’ (NGO Eastern-Ukrainian Centre for Civic Initiatives, 2017) (‘War Without Rules 2017’), pp. 73, 78. Moreover, the figures presented by Ukrainian Coalition ‘Justice for Peace in Donbas’ in 2017 revealed the following: every third woman interviewed admitted to have been subjected to sexual violence by armed groups: “rape – 22 cases”; “sexual insults, humiliation, intimidation – 10 cases”; “forced nudity – 9 cases”; “attempted rape – 8 cases”; “rape threats – 7 cases”; “sexual violence as part of torture or inhuman treatment - 3 cases”; “forced prostitution – 2 cases”; “damage to a pregnant woman’s womb – 2 cases”; “threats of sexual violence against family members – 2 cases”; and “absence of separate bathroom and/or shower facilities for men and women – 16 cases”, whereas every fourth man interviewed admitted to the same: “rape – 9 cases”; “threat of rape – 9 cases”; “threat of castration – 8 cases”; “threats of sexual violence against family members – 3 cases”; “attempted castration – 3 cases”; and “attempted rape – 1 case” (War Without Rules 2017, p. 86). In Crimea, CRSV most often takes the form of sexualised torture in detention by law enforcement: OHCHR, ‘Report on the Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, 13 September 2017 to 30 June 2018’ (10 September 2018), para. 5. See also, OHCHR, ‘Report on the Human Rights Situation in Ukraine 16 February to 31 July 2020’ (22 September 2020) (‘OHCHR, 22 September 2020 Human Rights Report’), paras 61, 63. Data from 2020 provided by the OHCHR shows that rape, sexualised torture, forced nudity and other acts of sexual violence continued to be committed in detention centres and at checkpoints: OHCHR, ‘Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020’ (12 March 2020); OHCHR, 22 September 2020 Human Rights Report, paras 62, 63; OHCHR, ‘Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine April 2014 – April 2020’ (27 August 2020), p. 36; OHCHR, 16 February 2017 CRSV Report, para. 81. See also, “They described how my daughter will die. Stories of women that survived violence and detention by the D/LPR militants’ (*Novoye Vremia*, 19 June 2021); K. Busol, ‘Conflict-Related Sexual Violence in Ukraine: An Opportunity for Gender-Sensitive Policymaking?’ (*Chatham House*, 18 August 2020) (‘Busol, CRSV in Ukraine: An Opportunity for Gender-Sensitive Policymaking?’); M. Roache, ‘As Ukraine’s Rape Epidemic Goes Largely Ignored, Survivors Plead for Help’ (*Vice*, 21 March 2018); Amnesty International, DSV Against Women in Eastern Ukraine, pp. 61-62; Order of the Cabinet of Ministers of Ukraine ‘On approval of the National Action Plan for the Implementation of UN Security Council Resolution 1325 “Women, Peace Security” for the period up to 2025’ of 28 October 2020 No 1544-p.

<sup>1981</sup> See e.g., W. Benedek, V. Bílková and M. Sassòli, ‘Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine Since 24 February 2022’ (OSCE 13 April 2022) (‘OSCE, Report on Violations Committed in Ukraine Since 24 February 2022’), p. 76; N. Vasilyeva, ‘Nine Women and Girls in Bucha Pregnant After Being Raped by Russian Soldiers, Kyiv Says’ (*The Telegraph*, 12 April 2022); Y. Limaye, ‘Ukraine Conflict: “Russian Soldiers Raped Me and Killed My Husband”’ (*BBC*, 12 April 2022); C. Gall, ‘Bucha’s Month of Terror’ (*NYT*, 11 April 2022); HRW, ‘Ukraine: Apparent War Crimes in Russia-Controlled Areas’ (3 April 2022); C. Engelbrecht, ‘Reports of Sexual Violence Involving Russian Soldiers Are Multiplying, Ukrainian Officials Say’ (*NYT*, 29 March 2022); OHCHR, ‘Update on the Human Rights Situation in Ukraine Reporting Period: 24 February – 26 March’ (28 March 2022) (‘OHCHR, Update on the Human Rights Situation in Ukraine Reporting Period: 24 February – 26 March’), paras 42-45; C. Philip, “Russian Soldiers Raped Me as My Terrified Son Cried” (*The Times*, 28 March 2022); Ukraine’s prosecutor general, Iryna

Nonetheless, sexual violence remains underreported in Ukraine due to, among other reasons: community stigma; fear of re-traumatisation and reprisals;<sup>1982</sup> a reluctance or unwillingness on the part of some criminal justice actors to initiate CRSV investigations;<sup>1983</sup> and the view of, in particular, investigators and prosecutors that corroborating evidence, including medical and forensic examinations, is essential for the successful prosecution of CRSV cases.<sup>1984</sup>

Addressing CRSV is a crucial component of achieving accountability and sustainable peace for States experiencing conflict, and those transitioning out of conflict.<sup>1985</sup> Addressing CRSV early on, while a conflict is ongoing, is vital to ensure the provision of life saving and recovery services for survivors (i.e., medical services, mental health and psycho-social support, legal aid, etc.), but also to ensure accountability is sought as a means of deterrence and prevention of such crimes.<sup>1986</sup> Without this, the rights of survivors of CRSV to receive adequate redress for violations, and to participate in transitional justice processes, cannot be safeguarded, and the discriminatory structures and attitudes within the society that enabled sexual violence to occur in the first place will remain unchanged.<sup>1987</sup>

CRSV is a crime against a person's right to personal security and their physical, sexual and psychological integrity and autonomy.<sup>1988</sup> In addition to the domestic criminalisation of sexual violence,<sup>1989</sup> various forms of sexual violence are also internationally criminalised, as both crimes against humanity and war crimes. This includes rape; enforced prostitution; and any other form of sexual violence of comparable gravity (*see* Section 3.2).<sup>1990</sup> Evidence of CRSV may also be relevant to proving elements of other international crimes such as genocide, torture, persecution, inhumane

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Venediktova, Facebook post (22 March 2022); E. Hallsdóttir, 'Are Russian Troops Using Sexual Violence as a Weapon? Here's What We Know' (*The Washington Post*, 24 March 2022); A. Cowburn, 'Ukrainian MPs Detail 'Medieval' Tactics and Sexual Violence of Vladimir Putin's Army' (*Independent*, 17 March 2022); Reuters, 'Foreign Minister Accuses Russian Soldiers of Rape in Ukrainian Cities' (*Reuters*, 4 March 2022).

<sup>1982</sup> See e.g., OHCHR, 'Update on the Human Rights Situation in Ukraine Reporting Period: 24 February – 26 March', para. 43; CEDAW, 'Concluding observations on the 8th periodic report of Ukraine: Committee on the Elimination of Discrimination against Women' (9 March 2017) CEDAW/C/UKR/CO/8 ('CEDAW, Concluding Observations on the 8th Periodic Report of Ukraine'), para. 14; War Without Rules 2017, p. 73; M. Krauzman, 'Weaponisation of Female Bodies: Inaccurate Reports of Sexual Violence in the Donbas Conflict' (*Security Distillery*, 5 February 2021); C. Dolan, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict' (Briefing paper prepared for the workshop held at the Overseas Development Institute, London, 14 May 2014), p. 4.

<sup>1983</sup> HRMMU, UN Women Ukraine, 'Strategy for Prevention of and Response to CRSV in Ukraine' (2018) ('HRMMU, UN Women Ukraine, Strategy for Prevention of and Response to CRSV in Ukraine'), p. 20; OHCHR, 16 February 2017 CRSV Report, para. 83; Busol, CRSV in Ukraine: An Opportunity for Gender-Sensitive Policymaking?; Yarmoshchuk, 'Rape as a method of torture'; 'They described how my daughter will die. Stories of women that survived violence and detention by the D/LPR militants' (*Novoye Vremia*, 19 June 2021); FIDH, 'Accountability for Conflict-Related Sexual Crimes committed in Eastern Ukraine, Q&A' (September 2018), pp. 7-8.

<sup>1984</sup> OHCHR, 16 February 2017 CRSV Report, para. 117.

<sup>1985</sup> Human Rights Council ('HRC'), 'Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice: Report of the Office of the United Nations High Commission for Human Rights' (30 June 2014) A/HRC/27/21 ('HRC, Study on Gender-Based Violence in Relation to Transitional Justice'), para. 7.

<sup>1986</sup> Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, 'Ukraine: UN High Level Officials Urge the Swift Investigation of Sexual Violence Allegations and Call for Strengthened Measures to Protect Women and Girls' (UN, 7 April 2022). See also, International Committee of the Red Cross ('ICRC'), 'Special Appeal: Addressing Sexual Violence' (2021), p. 11; K. Jayakumar, 'Documenting Conflict-Related Sexual Violence: A Call for Institutional Introspection' (*The Gender Security Project*, 9 February 2021).

<sup>1987</sup> HRC, Study on Gender-Based Violence in Relation to Transitional Justice, paras 7, 15.

<sup>1988</sup> CEDAW, General Recommendation No. 35, para. 33; Karen Tayag Vertido v. the Philippines, Communication No. 18/2008, 22 September 2009, CEDAW/C/46/D/18/2008 ('*Karen Tayag Vertido v. the Philippines*'), para. 8.7; R.P.B. v. the Philippines, Communication No. 34/2011, 12 March 2014, CEDAW/C/57/D/34/2011, ('*R.P.B. v. the Philippines*'), para. 8.10.

<sup>1989</sup> See e.g., Criminal Code of Ukraine ('CCU'), Articles 152-156-1.

<sup>1990</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2001) 2187 UNTS 3 ('Rome Statute'), Article 7(1)(g), Article 8(2)(b)(xxii), Article 8(2)(e)(vi); CEDAW, General Recommendation No. 35, para. 16.

and degrading treatment and deportation and forcible transfer.<sup>1991</sup> Evidence of sexual violence may also be relevant to a range of other domestic crimes.<sup>1992</sup>

This section promotes a victim-centred approach to documenting CRSV crimes. A victim-centred approach requires placing the needs and priorities of victims at the forefront of any response to CRSV.<sup>1993</sup>

With a view to assisting practitioners documenting CRSV cases, this section will address the following themes:

- **7.1 Understanding and identifying CRSV crimes:** understanding how to recognise acts of a sexual nature.
- **7.2 Classifying CRSV crimes in Ukraine:** understanding how to identify international and domestic CRSV offences.
- **7.3 Lack of consent and coercive circumstances:** recognising the coercive behaviours and circumstances that may be relevant when documenting CRSV as international crimes or domestic offences.
- **7.4 Linking perpetrators to acts of CRSV:** considering linkage evidence to connect perpetrators to the commission of crimes.
- **7.5 Obtaining corroborating evidence of CRSV:** understanding the issue of corroborating evidence for CRSV offences.
- **7.6 Victims and impact of CRSV:** understanding the varying intersectional factors that can affect an individual's experience of CRSV and the potential impacts of CRSV on the victim and the wider community.
- **7.7 Best practice approaches to documenting CRSV:** understanding how to follow a best practice approach to documenting CRSV, understand stigma and shame, and end the myths and stereotypes that surround CRSV).<sup>1994</sup>

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<sup>1991</sup> See e.g., Rome Statute, Article 6(b) (genocide by causing serious bodily or mental harm); Article 7(1)(d), (f), (h) and (k) (crimes against humanity of deportation or forcible transfer of population, torture, persecution and other inhumane acts), and Articles 8(2)(a)(ii) (war crime of torture and inhumane treatment), 8(2)(a)(iii) (war crime of wilfully causing great suffering), 8(2)(a)(vii) (war crime of deportation and transfer).

<sup>1992</sup> See e.g., CCU, Article 115 (murder); Article 116 (murder committed in the heat of passion); Article 121 (intended grievous bodily injury); Article 122 (intended bodily injury of medium gravity); Article 123 (intended grievous bodily injury inflicted in the heat of passion); Article 126 (battery); Article 126-1 (domestic violence); Article 127 (torture); Article 130 (infection with HIV or any other incurable contagious disease).

<sup>1993</sup> UN Women: Virtual Knowledge Centre to End Violence against Women and Girls, 'Victim/Survivor Centred Approach' (14 January 2019).

<sup>1994</sup> These principles are also discussed in detail in Section 6, which should be read in close conjunction with this section.

## 7.1 UNDERSTANDING AND IDENTIFYING CRSV CRIMES

Acts of sexual violence are intentional, non-consensual,<sup>1995</sup> acts of a sexual nature.<sup>1996</sup> Sexual violence can be committed at any time and in any environment, including marital, familial or intimate relationships.<sup>1997</sup> These acts can be “single, multiple, continuous, or intermittent”.<sup>1998</sup> CRSV is sexual violence that occurs in the context of a conflict. There is **a broad range of conduct** which may amount to CRSV, including non-physical acts (*see below*).

An act of CRSV may be committed against one or more persons, or by causing a person to engage in an act of a sexual nature (e.g., on the perpetrator, themselves or a third party).<sup>1999</sup> It can be committed by or against any person, regardless of age, sex or gender.<sup>2000</sup> Accordingly, the following section provides guidance on how to recognise acts of a sexual nature.

### 7.1.1 Recognising Acts of a Sexual Nature

The first step in proving the commission of CRSV is to establish that a sexual act took place.<sup>2001</sup> Whether an act is *sexual* in nature is rooted in the perceptions of the victim, the perpetrator and/or their respective communities.<sup>2002</sup> An act may be sexual in nature regardless of whether it produced, or was intended to produce, sexual gratification for the perpetrator.<sup>2003</sup> As such, there is a broad

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<sup>1995</sup> The term ‘non-consensual’ is used to describe an act that was committed with force, under coercive conditions or environments or against a person incapable of giving genuine consent.

<sup>1996</sup> CEDAW, General Recommendation No. 35, para. 33; ACHPR, ‘Guidelines on Combating Sexual Violence’ (2017) (ACHPR), ‘Guidelines on Combating Sexual Violence’, para. 3.1(a); *Karen Tayag Vertido v. the Philippines*, para. 8.7; *R.P.B. v. the Philippines*, para. 8.10. *See also*, Council of Europe (‘CoE’), Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No.210 (‘Istanbul Convention’), Article 36; Explanatory Report to the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) CETS No. 210 (‘Istanbul Convention Explanatory Report’), paras 189-190; Women’s Initiatives for Gender Justice, ‘The Hague Principles on Sexual Violence’ (2019) (‘The Hague Principles on Sexual Violence’), p. 6.

<sup>1997</sup> The Hague Principles on Sexual Violence, pp. 6, 13; CEDAW, General Recommendation No. 35, para. 20; Istanbul Convention, Article 36(3); Istanbul Convention Explanatory Report, para. 194; ACHPR, ‘Prevention and Eradication of Violence against Women and Children (Addendum to the SADC Declaration on Gender and Development)’ (14 September 1998), para. 5.

<sup>1998</sup> The Hague Principles on Sexual Violence, p. 6.

<sup>1999</sup> CCU, Article 153(1); ICC Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘ICC Elements of Crimes’), Articles 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1. *See also*, Istanbul Convention, Article 36(1); Istanbul Convention Explanatory Report, para. 190; The Hague Principles on Sexual Violence, pp. 39-40; ACHPR, Guidelines on Combatting Sexual Violence, para. 3.1. *See also e.g.*, *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998 (‘*Delalić et al.* Trial Judgment’), para. 1065; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment, 31 July 2001 (‘*Todorović* Sentencing Judgment’), paras 38-40.

<sup>2000</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Judgment, 8 July 2019 (‘*Ntaganda* Trial Judgment’), para. 933; *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016 (‘*Bemba* Trial Judgment’), para. 100. *See also*, ICC, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014) (‘ICC, Policy Paper on Sexual and Gender-Based Crimes 2014’), p. 9, fn. 6; The Hague Principles on Sexual Violence, pp. 6, 13, 39.

<sup>2001</sup> *See e.g.*, CCU, Articles 152(1), 153(1). *See also*, ICC Elements of Crimes, Article 7(1)(g)-1, Element 1; Article 8(2)(b)(xxii)-1, Element 1; Article 8(2)(e)(vi)-1, Element 1.

<sup>2002</sup> The Hague Principles on Sexual Violence, pp. 5, 22.

<sup>2003</sup> The Hague Principles on Sexual Violence, pp. 6, 14; ACHPR, Guidelines on Combatting Sexual Violence, para. 3.1(b). *See e.g.*, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Judgment, 26 February 2009 (‘*Milutinović et al.* Trial Judgment’), para. 199.

spectrum of acts, both physical and non-physical, which may be deemed to be sexual in nature.<sup>2004</sup> CRSV does not necessarily have to cause physical injury,<sup>2005</sup> or even involve physical contact.<sup>2006</sup>

The Hague Principles on Sexual Violence provide useful guidance on what, in context, makes violence ‘sexual’, especially from the viewpoint of survivors.<sup>2007</sup> Understanding which acts may be considered to amount to acts of a sexual nature will enable practitioners to fully appreciate the broad range of conduct that may be classified as CRSV.

According to international standards, acts of sexual violence include:<sup>2008</sup>

- (i) acts committed by one person against another;
- (ii) acts that one person causes another person to commit against themselves, against a third party (including another person or an animal) or on a dead body; or
- (iii) acts orchestrated or facilitated by a group, political or State entity or other organisation.

The following non-exhaustive list is drawn from international best practice as well as the lived experience of victims of sexual violence,<sup>2009</sup> and sets out examples of conduct that may constitute acts of a sexual nature:<sup>2010</sup>

- (i) Castration, mutilation of sexual organs, forced circumcision and female genital mutilation;<sup>2011</sup>
- (ii) Enforced prostitution (*see* Sections 3.2.9 and 3.2.43);<sup>2012</sup>
- (iii) Forced masturbation and any other forced touching that the survivor is compelled to perform on himself or a third person;<sup>2013</sup>

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<sup>2004</sup> ACHPR, Guidelines on Combatting Sexual Violence, para. 3.1.b; ACHPR, ‘General Comment No. 4 on the African Charter on Human and People’s Rights’ (23 February – 4 March 2017) (‘ACHPR, General Comment No. 4’), para. 58; *Prosecutor v. Akeyesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998 (‘*Akeyesu* Trial Judgment’), para. 688; *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998 (‘*Furundžija* Trial Judgment’), para. 186; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007, para. 720; *Milutinović et al.* Trial Judgment, paras 194-195, 199; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Trial Judgment, 27 February 2009, para. 379. *See also*, ICC, Policy Paper on Sexual and Gender-Based Crimes 2014, p. 3; United Nations Economic and Social Council (‘ECOSOC’), Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict’ (22 June 1998) E/CN.4/Sub.2/1998/13 (‘ECOSOC, “Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict”’), paras 21-22.

<sup>2005</sup> The Hague Principles on Sexual Violence, p. 13. *See also e.g.*, *Akeyesu* Trial Judgment, para. 10A.

<sup>2006</sup> The Hague Principles on Sexual Violence, p. 6; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1(b).

<sup>2007</sup> The Hague Principles on Sexual Violence, p. 32.

<sup>2008</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>2009</sup> The Hague Principles on Sexual Violence, p. 4.

<sup>2010</sup> This list is presented alphabetically to avoid a perception of hierarchy among them.

<sup>2011</sup> The Hague Principles on Sexual Violence, p. 10; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; ACHPR, General Comment No. 4, para. 58; ACHPR, ‘Resolution on the Situation of Women and Children in Armed Conflict’ (2014) ACHPR/Res.283(LV).

<sup>2012</sup> Rome Statute, Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); African Union (‘AU’), ‘AU Strategy for Gender Equality & Women’s Empowerment 2018 – 2028’ (2019), p. 62; AU, ‘African Union Policy on Prevention and Response to Sexual Exploitation and Abuse for Peace Support Operations’ (2018), para. 22; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; ACHPR, General Comment No. 4, para. 58.

<sup>2013</sup> ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b.



- (iv) Having someone undress completely or partially (i.e., forced nudity),<sup>2014</sup> including the removal of headwear in cultures where this has a sexual implication;<sup>2015</sup>
- (v) Having someone wear clothing with a sexual association;<sup>2016</sup>
- (vi) Human trafficking for sexual exploitation and slavery;<sup>2017</sup>
- (vii) Inspecting someone's genitals, anus, breasts or hymen without medical or similar necessity;<sup>2018</sup>
- (viii) Kissing or licking a person, especially a sexual body part;<sup>2019</sup>
- (ix) Punishing someone for refusing to engage in sexual activity;<sup>2020</sup>
- (x) Rape (including gang rape, marital rape or 'corrective' rape), which includes penetration of the vagina, anus or mouth by any part of the body or object (e.g., a stick);<sup>2021</sup>
- (xi) Sexually harassing someone by engaging in (repeated) unwelcome sexual conduct which can be interpreted as offensive, humiliating or intimidating under the circumstances;<sup>2022</sup>
- (xii) Threats of sexual violence or intimidation or causing someone to form reasonable apprehension, or fear, of acts of sexual violence;<sup>2023</sup>
- (xiii) Touching a person in a sexual manner, for example, by giving or receiving massages;<sup>2024</sup>
- (xiv) Touching a person's sexual body parts,<sup>2025</sup> for example, touching their breasts or putting their hands inside the survivor's underwear or garment; or
- (xv) Violent acts to the genitalia (such as beating, burning, electrical shocks or blows),<sup>2026</sup> for example, electrocuting and driving objects into a person's penis.

## 7.2 CLASSIFYING CRSV CRIMES IN UKRAINE

Whether documenting CRSV with a view to collecting information that may be used in domestic prosecutions; at the ICC; international or regional investigative or accountability mechanisms; or

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<sup>2014</sup> The Hague Principles on Sexual Violence, p. 10; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; ACHPR, General Comment No. 4, para. 58; *Akayesu* Trial Judgment, para. 688; OHCHR, 16 February 2017 CRSV Report, para. 69.

<sup>2015</sup> The Hague Principles on Sexual Violence, p. 10; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; ACHPR, General Comment No. 4, para. 58; *Akayesu* Trial Judgment, para. 688.

<sup>2016</sup> The Hague Principles on Sexual Violence, p. 9.

<sup>2017</sup> ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; ACHPR, General Comment No. 4, para. 58.

<sup>2018</sup> ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; The Hague Principles on Sexual Violence, p. 10.

<sup>2019</sup> The Hague Principles on Sexual Violence, p. 10.

<sup>2020</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>2021</sup> Rome Statute, Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; The Hague Principles on Sexual Violence, p. 12.

<sup>2022</sup> The Hague Principles on Sexual Violence, p. 9; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; ACHPR, General Comment No. 4, para. 58.

<sup>2023</sup> The Hague Principles on Sexual Violence, p. 8; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; ACHPR, General Comment No. 4, para. 58; OHCHR, 16 February 2017 CRSV Report, paras 68, 74.

<sup>2024</sup> The Hague Principles on Sexual Violence, p. 10.

<sup>2025</sup> The Hague Principles on Sexual Violence, p. 10; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; OHCHR, 16 February 2017 CRSV Report, paras 80-81.

<sup>2026</sup> The Hague Principles on Sexual Violence, p. 10; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.b; *Delalić et al.* Trial Judgment, paras 1019, 1035, 1038-1040; *Todorović* Sentencing Judgment, para. 38; *Prosecutor v. Simić*, IT-95-9/2-S, Sentencing Judgment, 17 October 2002, para. 63; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Trial Judgment, 31 March 2003, para. 450; *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, 1 September 2004 ('*Brdanin* Trial Judgment'), para. 498; OHCHR, 16 February 2017 CRSV Report, paras 70-71.

national war crimes units in other States to support universal jurisdiction prosecutions, practitioners should understand the domestic and international crimes that are relevant to CRSV.

Accordingly, CRSV can be classified as:

- The war crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence prohibited by Article 8(2)(b)(xxii) of the Rome Statute and under Article 438 of the Criminal Code of Ukraine ('CCU').
- The crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence prohibited by Article 7(1)(g) of the Rome Statute, but not yet criminalised under Ukrainian law.
- Conduct amounting to various other international crimes including torture, genocide, persecution, inhumane and degrading treatment and deportation and forcible transfer.
- A domestic crime under Articles 152-156-1 of the CCU. However, as discussed below, these crimes are unlikely to accurately capture the nature and gravity of CRSV.

Each of these will be discussed, in turn, below.

### 7.2.1 Specific CRSV War Crimes

#### 7.2.1.1 *CRSV War Crimes under the Rome Statute*

The war crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence are prohibited by Article 8(2)(b)(xxii) of the Rome Statute, when committed in the context of an international armed conflict, and Article 8(2)(e)(vi), when committed in the context of a non-international armed conflict.<sup>2027</sup>

See Sections 3.2.41-3.2.45 for a detailed discussion of the elements of the CRSV war crimes. It should be noted that, in order to constitute war crimes, these acts must be committed in the context of an international or non-international armed conflict (see Section 3.1.2).

#### 7.2.1.2 *CRSV War Crimes under Ukrainian Law*

The primary provision under the CCU that relates to CRSV as a war crime is Article 438, which reads as follows:

##### **Violation of the laws and customs of war**

1. Cruel treatment of prisoners of war or civilians, deportation of the civilian population for forced labour, pillage of national treasures on occupied territories, use of methods of warfare prohibited by international instruments, or **any other violations of rules of warfare recognised by international treaties ratified by the Verkhovna Rada of Ukraine**, and also giving an order to commit any such actions, -  
  
shall be punishable by imprisonment for a term of eight to twelve years.

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<sup>2027</sup> A non-international armed conflict existed in Donbas between 14 April 2014 in Donetsk and 30 April 2014 in Luhansk, between Ukraine and the D/LPR non-state armed groups. At all other times an IAC has existed between Russia and Ukraine. See, GRC, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (2022), Section 4.1.3.

The reference in Article 438 to “international treaties, ratified by the Verkhovna Rada” includes the Geneva Conventions and their Additional Protocols. Article 438 therefore applies to both non-international and international armed conflicts and covers the commission of rape and other forms of sexual violence, which are prohibited under these treaties.<sup>2028</sup>

### 7.2.1.3 *Specific CRSV War Crimes under Draft Bill 7290*

In addition, Draft Bill 7290 (if, and when, it enters into force) will introduce provisions specifically criminalising “the intentional commission (infliction) in connection with an international armed conflict or a conflict of a non-international character in relation to a person under the protection of international humanitarian law: [...] rape, sexual exploitation, forced prostitution, forced pregnancy, forced sterilisation and any other forms of sexual violence” under Article 442-1.1(4) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the CRSV war crimes in the Rome Statute and ICC Elements of Crimes (*see* Sections 3.1 and 3.2).

In order to constitute a war crime under the Rome Statute, the crime of “any other form of sexual violence” must meet a certain gravity threshold. Specifically, it must constitute “a grave breach of the Geneva Conventions” (Article 8(2)(b)(xxii)) or “a serious violation of article 3 common to the four Geneva Conventions” (Article 8(2)(e)(vi)). However, Draft Bill 7290 does not contain this gravity threshold requirement.

## 7.2.2 *Specific CRSV Crimes against Humanity*

Crimes against humanity, including sexual violence crimes, are not currently proscribed by the CCU; they are, however, prohibited under the Rome Statute.

### 7.2.2.1 *CRSV Crimes against Humanity under the Rome Statute*

The crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence are prohibited by Article 7(1)(g) of the Rome Statute, when committed as part of a widespread or systematic attack against any civilian population.

*See* Sections 3.2.7-3.2.11 for a detailed discussion of the specific elements required to establish the CRSV crimes against humanity. It should be noted that these crimes must be committed as part of a widespread or systematic attack against the civilian population (*see* Section 3.1.1).

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<sup>2028</sup> *See e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) (‘Fourth Geneva Convention’), Article 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) (‘Additional Protocol I’), Article 75(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) (‘Additional Protocol II’), Article 4(2). *See also*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, 21 October 1950) (‘First Geneva Convention’), Common Article 3; Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) (‘Third Geneva Convention’), Article 14; ICRC, Customary IHL Database, Rule 93. Rape and Other forms of Sexual Violence.

### 7.2.2.2 *Specific CRSV Crimes against Humanity under Draft Bill 7290*

Draft Bill 7290 (if, and when, it enters into force) will introduce the specific crimes against humanity of rape, sexual exploitation, forced prostitution, forced pregnancy, forced sterilisation and any other forms of sexual violence when intentionally committed (inflicted) within the framework of a widespread or systematic attack on civilians under 442-1.1(4) of the CCU.

This provision broadly aligns with the contextual elements and the specific elements of the CRSV crimes against humanity contained in the Rome Statute and ICC Elements of Crimes. However, while the Rome Statute requires that the conduct amounting to “any other form of sexual violence” must be of similar gravity to the other sexual violence offences (i.e., rape, sexual exploitation, forced prostitution, forced pregnancy and forced sterilisation), Draft Bill 7290 does not contain this requirement.

### 7.2.3 CRSV Amounting to Other International Crimes

Evidence of CRSV may also be relevant to establishing other international crimes such as torture, genocide and persecution, which will be discussed, in turn, below. In addition, evidence of CRSV may also be relevant to establishing other international crimes such as inhumane and degrading treatment or deportation and forcible transfer,<sup>2029</sup> the elements of which are discussed in more detail in Section 3.2.

#### 7.2.3.1 *Torture*

Rape constitutes an act of torture.<sup>2030</sup> Additionally, a range of sexually violent acts have been considered to amount to torture including: kicking the victim in their genitals;<sup>2031</sup> subjecting the victim to sexual intimidation or violence, including unbuttoning a female detainees shirt, drawing a knife over her breast and threatening to cut it off;<sup>2032</sup> sexually abusing detainees through forced mutual oral sex or oral sex with prison guards, and mutual masturbation;<sup>2033</sup> forcing a victim to watch another soldier’s sexual attacks on another victim;<sup>2034</sup> forcing the victim to undress;<sup>2035</sup> and a prison guard forcing the victim to prove she was menstruating.<sup>2036</sup>

CRSV may amount to the crime against humanity of torture (Article 7(1)(f) of the Rome Statute) or the war crime of torture in an international armed conflict (Article 8(2)(a)(ii) of the Rome Statute) or non-international armed conflict (Article 8(2)(c)(i) of the Rome Statute). See Sections 3.2.4 and 3.2.13

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<sup>2029</sup> See e.g., Rome Statute, Article 6(b) (genocide by causing serious bodily or mental harm); Article 7(1)(d), (f), (h) and (k) (crimes against humanity of deportation or forcible transfer of population, torture, persecution and other inhumane acts), and Articles 8(2)(a)(ii) (war crime of torture and inhumane treatment), 8(2)(a)(iii) (war crime of wilfully causing great suffering), 8(2)(a)(vii) (war crime of deportation and transfer).

<sup>2030</sup> *Prosecutor v. Mucić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998, paras 495-496.

<sup>2031</sup> *Brdanin* Trial Judgment, paras 498, 524, 538, 998, 1050, 1061, 1088.

<sup>2032</sup> *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgment, 2 November 2001 (*“Kvočka et al. Trial Judgment”*), paras 98, 108, 229, 234, 319-321, 408, 415, 419-420, 470, 504.

<sup>2033</sup> *Prosecutor v. Martić*, IT-95-11-T, Trial Judgment, 12 June 2007, paras 288, 454-455, 477, 480, 518.

<sup>2034</sup> *Furundžija* Trial Judgment, paras 267, 87, 127, 268.

<sup>2035</sup> *Brdanin* Trial Judgment, paras 1013, 524, 538, 998., 1050, 1061.

<sup>2036</sup> *Kvočka et al. Trial Judgment*, paras 105, 415, 419-420, 470, 504, 578-579, 691, 752-753.

for a detailed discussion of the elements of torture as a crime against humanity and war crime, respectively.

Domestically, torture may amount to a war crime (under Article 438) when committed in the context of an armed conflict, or as a domestic crime under Article 127 of the CCU. If, and when, Draft Bill 7290 enters into force, the CCU will be amended to incorporate the crime against humanity of torture under Article 442-1.1(8), and the war crime of torture under Article 438.2(9).

### 7.2.3.2 *Genocide or Persecution*

If the CRSV has been committed with a discriminatory intent against a certain category of persons, it may – if other circumstances are met – establish the elements of either genocide or persecution.

#### 7.2.3.2.1 *Genocide*

Acts of CRSV may – if certain circumstances are met – amount to an act of genocide or demonstrate a perpetrator’s genocidal intent. Genocide is prohibited by Article 6 of the Rome Statute, which proscribes certain acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, and Article 442 of the CCU which prohibits certain acts committed “for the purpose of total or partial destruction of any national, ethnic, racial, or religious group”.

CRSV can amount to a genocidal act when committed with a discriminatory intent, i.e., with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. For example:

- It has been recognised that rape and sexual violence result in serious physical and psychological harm to the victims, their families and communities.<sup>2037</sup> Sexual violence can therefore act as an integral part of the process of destruction – destruction of the spirit, the will to live, and life itself.<sup>2038</sup> Consequently, sexual violence may amount to “causing serious bodily or mental harm to members of the group” under Article 6(b) of the Rome Statute.<sup>2039</sup> Similarly, CRSV can amount to “inflicting grave bodily injuries” as an act of genocide under Article 442 of the CCU.
- Sexual violence may also amount to an act of genocide by imposing measures intended to prevent births under Article 6(d) of the Rome Statute. This is also covered by the wording “decrease or prevention of childbearing in the group” under Article 442 of the CCU. This occurs, for example, where the victims of CRSV are so traumatised they develop anxieties around any contact with men and/or an unwillingness to procreate.<sup>2040</sup> For example, in March 2022 in Bucha, a group of women and girls, aged 14 to 24, were purportedly held by Russian soldiers in a basement for 25 days during which time they were raped by the soldiers who

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<sup>2037</sup> *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para. 320; *Prosecutor v. Ntagerura*, ICTR-99-46-T, Judgment and Sentence, 24 February 2004, para. 664.

<sup>2038</sup> *Akayesu* Trial Judgment, para. 732.

<sup>2039</sup> See e.g., *Akayesu* Trial Judgment, para. 731; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Trial Judgment, 11 January 2013, paras 1665-1668; *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 320; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Judgment, 24 February 2004, para. 664.

<sup>2040</sup> *Akayesu* Trial Judgment, para. 508. See also, African Rights, ‘Rwanda – Broken Bodies, Torn Spirits: Living with Genocide, Rape and HIV/AIDS’ (April 2004), p. 75; HRC, “‘They Came to Destroy’: ISIS Crimes Against the Yazidis’ (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 145.

told them that “they would rape them to the point where they wouldn't want sexual contact with any man, to prevent them from having Ukrainian children”.<sup>2041</sup>

- Measures intended to prevent births within the group may also include instances where the victim is forcibly impregnated by the perpetrator. Indeed, campaigns of rape directed towards conceiving forced pregnancies can, if the pregnancies are carried to term, result in demographic changes to the protected group.<sup>2042</sup> For example, 9 of the aforementioned group of women and girls who were locked in a basement in Bucha by Russian soldiers became pregnant as a result of the rapes they endured.<sup>2043</sup>

Additionally, in certain cases, acts of CRSV may also be demonstrative of ‘genocidal intent,’ which refers to the specific intent requirement of an act of genocide according to which the perpetrator must intend to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (*see* Section 3.1.3.2).<sup>2044</sup> Acts of rape and sexual violence can form an integral part of the process of destruction required by genocidal intent.<sup>2045</sup> For example, in patriarchal societies, where the identity of the father is integral to membership of a group, raping a woman belonging to such a group, with the intent to make her give birth to a child who does not belong to that group, may be indicative of genocidal intent to destroy that group.<sup>2046</sup>

The elements of the crime of genocide are discussed in detail, above, in Sections 3.2.48 to 3.2.52.

#### 7.2.3.2.2 *Persecution*

In addition, when severe deprivations of fundamental rights (including sexual violence) are targeted against a group based on political, racial, national, cultural, religious, gender or other grounds universally recognised under international law, it amounts to the crime against humanity of persecution.<sup>2047</sup> Importantly, the Rome Statute recognises persecution on the grounds of gender,

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<sup>2041</sup> A. Vagianos, ‘Russia Is Using Rape As A Weapon Of War Against Ukraine’ (*Harvard Kennedy School Belfer Centre for Science and International Affairs*, 21 April 2022); Y. Limaye, ‘Ukraine conflict: ‘Russian soldiers raped me and killed my husband’ (BBC, 11 April 2022).

<sup>2042</sup> Global Justice Centre, ‘Beyond Killing: Gender, Genocide, & Obligations Under International Law’ (6 December 2018), p. 28.

<sup>2043</sup> A. Vagianos, ‘Russia Is Using Rape As A Weapon Of War Against Ukraine’ (*Harvard Kennedy School Belfer Centre for Science and International Affairs*, 21 April 2022); Y. Limaye, ‘Ukraine Conflict: “Russian Soldiers Raped Me and Killed My Husband” (BBC, 12 April 2022); N. Vasilyeva, ‘Nine Women and Girls in Bucha Pregnant After Being Raped by Russian Soldiers, Kyiv Says’ (*The Telegraph*, 12 April 2022); C. Gall, ‘Bucha’s Month of Terror’ (*NYT*, 11 April 2022).

<sup>2044</sup> Rome Statute, Article 6; *Prosecutor v. Krstić*, IT-98-33-A, Appeals Judgment, 19 April 2004, para. 20.

<sup>2045</sup> *Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005, para. 662; *Akayesu* Trial Judgment, paras 731-732.

<sup>2046</sup> *Akayesu* Trial Judgment, para. 507-508.

<sup>2047</sup> Rome Statute, Article 7(1)(h); ICC Elements of Crimes, Article 7(1)(h). *See e.g.*, *Brđanin* Trial Judgment, para. 1049; *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Judgment, 27 September 2004, para. 1145; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment, 2 August 2001; *Milutinović et al.* Trial Judgment; *Prosecutor v. Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, fn. 105; *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgment, 27 February 2003, paras 11, 52; *Todorović* Sentencing Judgment, paras 38-40; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgement and Sentence, 18 December 2008, para. 2212.



which relates to the “two sexes, male and female, within the context of society”.<sup>2048</sup> This is widely considered to include persecution on account of sexual orientation or gender identity.<sup>2049</sup>

The elements of the crime of persecution are discussed in more detail in Section 3.2.12.

#### **7.2.4 Domestic Crimes Relevant to CRSV**

Additionally, CRSV can be classified as a range of ordinary domestic crimes contained in Articles 152-156-1 of the CCU.<sup>2050</sup> However, classifying CRSV as a domestic crime would not fully capture the underlying contextual elements, i.e., the nexus to the armed conflict or the widespread or systematic attack on the civilian population, and the penalties for such crimes may not reflect their gravity as international crimes.<sup>2051</sup> Thus, practitioners should focus on the CRSV war crimes and crimes against humanity described above.

### **7.3 LACK OF CONSENT AND COERCIVE CIRCUMSTANCES**

According to international standards, sexual violence takes place under a broad range of coercive circumstances.<sup>2052</sup> Focusing on coercive circumstances, rather than proving the non-consent of the victim, removes the focus from the acts and conduct of the victim to focus on the actions of the perpetrator and assessments of whether the surrounding circumstances were coercive.<sup>2053</sup>

Based on international standards, this section examines the coercive behaviours and circumstances that may be relevant when documenting allegations of CRSV.

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<sup>2048</sup> Rome Statute, Articles 7(1)(h), 7(3); ICC Elements of Crimes, Article 7(1)(h); *Prosecutor v. Al-Hassan*, ICC-01/12-01/18-461-Corr-Red, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 30 September 2019 and on 23 April 2020, paras 945-974; *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Public Redacted Version of ‘Request for Authorization of An Investigation pursuant to Article 15’, 20 November 2017), paras 115-121; ICC, Policy Paper on Sexual and Gender Based Violence, June 2014, p. 3; ICC, ‘Report on Preliminary Examination Activities 2018’ (5 December 2018), para. 225.

<sup>2049</sup> R. Grey et al., ‘Gender-based Persecution as a Crime against Humanity: The Road Ahead’ (2019) 17(5) Journal of International Criminal Justice, p. 14.

<sup>2050</sup> See, CCU, Article 152: rape (acts of sexual nature of vaginal, anal or oral penetration without the victim’s consent); Article 153: sexual violence (any acts of violence of a sexual nature not involving penetration committed without victim’s voluntary consent); Article 154: forced sexual intercourse (forcing a person to have sexual intercourse with another person without victim’s voluntary consent); Article 155: sexual relationships with a person under the age of 16 (natural or unnatural sexual relationships with a person under the age of 16 committed by an adult); Article 156: corruption of minors (committing lewd acts against a person under the age of 16); Article 156-1: harassment of a child for sexual purposes (an offer of a meeting made by an adult to a person under the age of sixteen, for the purpose of committing any acts of a sexual nature or lewd acts).

<sup>2051</sup> For instance, torture under Article 127(1) of the CCU is punishable by imprisonment for a term of two to five years; rape under Article 152(1) of the CCU is punishable by imprisonment for a term of three to five years.

<sup>2052</sup> CEDAW, General Recommendation No. 35, para. 33; Istanbul Convention, Article 36; Istanbul Convention Explanatory Report, paras 189, 191-194; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.a; *Karen Tayag Vertido v. the Philippines*, paras 8.7, 8.9.b(ii)(b); *R.P.B. v. the Philippines*, para. 8.10; *M.C. v. Bulgaria*, Application No. 39272/98, Judgement, 4 March 2004 (‘*M.C. v. Bulgaria*’), para. 163; *E.B. v. Romania*, Application No. 49089/10, Judgment, 19 March 2019, (‘*E.B. v. Romania*’), para. 56; ICC Elements of Crimes, Article 7(1)(g)-1, Element 2; Article 8(2)(b)(xxii)-1, Element 2; Article 8(2)(e)(vi)-1, Element 2.

<sup>2053</sup> See e.g., ICC Elements of Crimes, Article 7(1)(g)-1, Element 2; Article 8(2)(b)(xxii)-1, Element 2; Article 8(2)(e)(vi)-1, Element 2; ACHPR, Guidelines on Combating Sexual Violence, para. 3.1.a.

### 7.3.1 Definition of ‘Coercive Circumstances’ under the Criminal Code of Ukraine

The CCU defines rape, sexual violence and compulsion to sexual intercourse as occurring when a ‘sexual act’ or ‘sexual violence’ is committed without the voluntary consent of the victim.<sup>2054</sup> According to the explanatory Note to Article 152 (rape), “consent shall be deemed voluntary if it is the result of a person’s free act and deed, with due account of attending circumstances”.<sup>2055</sup>

This provision fails to provide sufficient clarity on what amounts to involuntary consent, e.g., physical or mental impairment, coercive circumstances such as situations of deprivation of liberty or power imbalance, and incapacitation.<sup>2056</sup> However, it is broad enough (particularly the reference to “due account of attending circumstances”) to be interpreted in line with international standards to cover physical force, threats of force or coercion, coercive circumstances and incapability of giving voluntary consent due to age, disability, illness, etc. (see Section 3.2.6.1.2).<sup>2057</sup>

War crimes under Article 438 of the CCU, and the crimes against humanity and war crimes of sexual violence contained in Draft Bill 7290, should also be interpreted as requiring the CRSV to take place under ‘coercive circumstances’, in line with international standards. As such, practitioners should focus on uncovering information that is indicative of coercion and coercive circumstances which, as described below, would cover any sexual violence committed in the context of an armed conflict or occupation.

### 7.3.2 Understanding ‘Coercive Circumstances’ in Line with International Standards

International criminal, customary and human rights law state that free, voluntary and genuine consent cannot be given to a sexual act imposed by actual or threatened force; coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power); by taking advantage of a coercive environment (such as armed conflict or occupation); or when committed against a person incapable of giving genuine consent.<sup>2058</sup>

Consequently, proving lack of consent or demonstrating the non-consent of the victim (i.e., by their words or deeds) is not required.<sup>2059</sup> A victim is **not** required to physically resist or fight back to

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<sup>2054</sup> CCU, Articles 152(1), 153(1), 154(1).

<sup>2055</sup> CCU, Note to Article 152.

<sup>2056</sup> O. Dudorov, ‘Ukrainian criminal law innovations regarding the liability for sex-delicts: some problematic aspects’ (*LexInform*, 4 February 2019); O. Dudorov, ‘Crimes against sexual freedom and untouchability (main provisions of criminal legal characteristics)’ (O. Didorenko Luhansk State University of Internal Affairs 2018), p. 22.

<sup>2057</sup> See e.g., *M.C. v. Bulgaria*, paras 79, 90, 132.

<sup>2058</sup> ICC, Rules of Procedure and Evidence, reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York (3-10 September 2002)* ICC-ASP/1/3 and Corr.1 (‘ICC Rules of Procedure and Evidence’), Rule 70; ICC Elements of Crimes, Article 7(2)(g)-1, Element 2; Article 8(2)(b)(xxii)-1, Element 2; Article 8(2)(e)(vi)-1, Element 2; *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021 (‘*Ongwen Trial Judgment*’), para. 2709; *Ntaganda Trial Judgment*, para. 934; *Bemba Trial Judgment*, paras 105-106; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, 7 March 2014 (‘*Katanga Trial Judgment*’), para. 965; *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 (‘*Katanga & Chui Decision on the Confirmation of Charges*’), paras 438-440. See also, *M.C. v. Bulgaria*, para. 181.

<sup>2059</sup> *Ongwen Trial Judgment*, para. 2709; *Ntaganda Trial Judgment*, para. 934; *Bemba Trial Judgment*, para. 106.

demonstrate lack of consent or the presence of coercive circumstances (see Section 3.2.6.1.2).<sup>2060</sup> In fact, it is common for there to be no physical resistance because of a variety of psychological factors (see below) or because victims fear further violence on the part of the perpetrator.<sup>2061</sup>

Generally speaking, it is common that several intersecting behaviours or circumstances will be in play at the same time, or across a period of time which will amount to an environment in which consent is not possible. For example, in a situation of occupation or armed conflict (which are inherently coercive), a comprehensive documentation process might reveal evidence of additional coercive factors including physical force, abuse of authority, psychological oppression and threats over a prolonged period of time.

The following sections provide examples of the different coercive behaviours and environments recognised thus far in international law. The conditions and circumstances described in this section can be used to assist practitioners when documenting CRSV as war crimes or crimes against humanity.

### 7.3.3 Physical Force

Use of physical force is clear evidence of non-consent, although it is not an element of CRSV *per se* and is therefore not necessary to establish coercive circumstances.<sup>2062</sup> Where physical force does occur, it does not need to reach a significant level, such as ‘excessive’ or ‘life-threatening physical force’.<sup>2063</sup> Specific reference to the application of physical force is not mentioned in Article 438 of the CCU (as it currently stands, and as amended by Draft Bill 7290 (if, and when, it enters into force)). This confirms that it is not a necessary element to establish coercive circumstances.

The following non-exhaustive list of examples of physical force may be indicators of coercive circumstances, as well as aggravating factors that will be relevant to sentencing:<sup>2064</sup>

- (i) Acts of violence directed towards the victim, such as hitting or slapping the victim including with an object (i.e., a gun);<sup>2065</sup>

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<sup>2060</sup> ICC Rules of Procedure and Evidence, Rule 70(c); *Ongwen Trial Judgment*, para. 2709; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Trial Judgment, 17 June 2004 (*Gacumbitsi Trial Judgment*), para. 325; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001 (*Kunarac et al. Trial Judgment*), paras 644-646. See also, *Karen Tayag Vertido v. the Philippines*, paras 8.7, 8.9.b(ii); *R.P.B. v. the Philippines*, para. 8.10; Istanbul Convention, Article 36; Istanbul Convention Explanatory Report, para. 191; *E.B. v. Romania*, para. 56.

<sup>2061</sup> *M.C. v. Bulgaria*, para. 164.

<sup>2062</sup> ICC Elements of Crimes, Articles 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1; *Ongwen Trial Judgment*, para. 2710; *Bemba Trial Judgment*, para. 103; *Akayesu Trial Judgment*, para. 688; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002 (*Kunarac et al. Appeal Judgment*), para. 129; *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Judgement, 18 May 2012 (*Taylor Trial Judgment*), para. 416; *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgment and Sentence, 28 April 2005 (*Muhimana Judgement and Sentence*), para. 544; *Katanga & Chui Decision on the Confirmation of Charges*, para. 440.

<sup>2063</sup> Amnesty International, ‘Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court’ (2011) (‘Amnesty International, Rape and Sexual Violence’), pp. 18-19.

<sup>2064</sup> Use of physical force or the resulting bodily/mental harm suffered by the victim can also be important evidence establishing aggravating circumstances. See e.g., CCU, Article 67(1): “Circumstances aggravating punishment” include (...) 5) “grave consequences caused by the offence”. See also, Istanbul Convention, Article 46(f); Istanbul Convention Explanatory Report, para. 241.

<sup>2065</sup> *Delalić et al. Trial Judgment*, para. 937; *Gacumbitsi Trial Judgment*, para. 208; *Prosecutor v. Musema*, ICTR-96-13-A, Judgment and Sentence, 27 January 2000, para. 833.

- (ii) Physically restraining the victim, such as pinning them down or grabbing their hands;<sup>2066</sup>
- (iii) Pushing the victim to the ground or dragging the victim;<sup>2067</sup>
- (iv) Acts of violence directed towards another person;<sup>2068</sup>
- (v) Using a knife to tear off the victim's clothes;<sup>2069</sup> or
- (vi) Pointing a weapon at the victim.<sup>2070</sup>

It should be noted, however, that many incidents of CRSV do not necessarily result in physical injury or leave any visible traces on the body of a victim.<sup>2071</sup> Moreover, evidence of physical injuries may no longer exist in those cases where reporting of the crime was delayed or where medical evidence is unavailable. Accordingly, practitioners should draw no adverse conclusions regarding the credibility of the victim in cases where there is no evidence of physical injuries. The victim should not be expected to explain why they bear no marks of physical violence.

### 7.3.4 Threats of Force

Threats of force against the victim can also constitute coercive circumstances.<sup>2072</sup> The harm threatened may be of physical force, but can also include threats of other harm (e.g., a threat to reveal the sexual encounter or threats against a family member). There is no need for physical force to actually occur.<sup>2073</sup> It is not necessary for the perpetrator to actually carry out the threat or even intend to do so. The threat itself is sufficient as long as it creates a reasonable fear in the victim that they or a third person will be harmed.<sup>2074</sup> The threats can be express or implied.

The threat may have been directed towards the victim, or a third person such as the victim's children or family,<sup>2075</sup> and may be expressed in words or actions, or as a combination of both. Further, the threat of force does not have to be immediate and may relate to a future occurrence.

The following is a non-exhaustive list of examples of threats of force:

- (i) Threats or intimidation using a weapon;<sup>2076</sup>
- (ii) Threats to kill or injure;<sup>2077</sup>
- (iii) Threats to harm sexual body parts;<sup>2078</sup>

<sup>2066</sup> *Karen Tayag Vertido v. the Philippines*, para. 2.2.

<sup>2067</sup> *Akayesu* Trial Judgment, para. 424; *Gacumbtsi* Trial Judgment, para. 208. See also, *Karen Tayag Vertido v. the Philippines*, para. 2.2; *E.B. v. Romania*, para. 10.

<sup>2068</sup> *Ntaganda* Trial Judgment, para. 944.

<sup>2069</sup> *Muhimana* Judgement and Sentence, para. 297.

<sup>2070</sup> *Delalić et al.* Trial Judgment, para. 958.

<sup>2071</sup> World Health Organization ('WHO'), 'Guidelines for Medico-Legal Care for Victims of Sexual Violence' (2003) ('WHO, Guidelines for Medico-Legal Care for Victims of Sexual Violence'), pp. 11, 49.

<sup>2072</sup> ICC Elements of Crimes, Article 7(1)(g)-1, Element 2; Article 8(2)(b)(xxii)-1, Element 2; Article 8(2)(e)(vi)-1, Element 2.

<sup>2073</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, para. 935; *Bemba* Trial Judgment, para. 103. See also, *Katanga & Chui* Decision on the Confirmation of Charges, para. 440; *Akayesu* Trial Judgment, para. 688; *Taylor* Trial Judgment, para. 416.

<sup>2074</sup> *Furundžija* Trial Judgment, para. 174.

<sup>2075</sup> *Furundžija* Trial Judgment, para. 82.

<sup>2076</sup> *Ntaganda* Trial Judgment, para. 944; *Delalić et al.* Trial Judgment, para. 958; *Kunarac et al.* Trial Judgment, para. 667.

<sup>2077</sup> *Ntaganda* Trial Judgment, para. 944. See also, *Kunarac et al.* Trial Judgment, paras 68, 711.

<sup>2078</sup> *Furundžija* Trial Judgment, para. 82.

- (iv) Threats to harm a person's health;<sup>2079</sup> and
- (v) Threats of being subjected to sexual violence.<sup>2080</sup>

Similar acts have been used frequently by the 'D/LPR' armed groups throughout the conflict in Donbas. For example, a 2017 study by 'Justice for Peace in Donbas' (a coalition of human rights organisations), collected information about 175 cases of sexual violence committed by armed groups in Donbas, which included a number of cases of threats of rape, castration and/or sexual violence against family members.<sup>2081</sup> Following Russia's full-scale invasion on 24 February 2022, similar situations have also been reported, even though the scale of the violations remains difficult to estimate.<sup>2082</sup> For example, one woman reported that, when Russian soldiers threatened to rape her young daughter, she persuaded them to take her instead.<sup>2083</sup>

### 7.3.5 Coercion

Perpetrators of CRSV will often employ more subtle behaviours, such as inducements or bullying (e.g., verbal or psychological abuse or controlling behaviour) to create or exploit vulnerabilities in victims and make them dependant on, or subordinate to, their abuser.<sup>2084</sup> This is known as coercion, or 'coercive' behaviour. As mentioned above, Article 438 of the CCU should be interpreted in light of the Rome Statute and the ICC Elements of Crimes (Article 8(2)(b)(xxii)). Thus, while it does not explicitly refer to 'coercion', Article 438 (as it currently stands, and as amended by Draft Bill 7290 (if, and when, it enters into force)) should be interpreted as implying that the existence of coercion will negate a finding of consent.

Accordingly, and in line with international standards, practitioners should adopt a flexible and context-based approach when documenting CRSV cases and consider evidence of the full range of coercive behaviours and circumstances that may give rise to CRSV. The following is a non-exhaustive list of examples of coercion:

- (i) Fear of violence, duress, detention, psychological oppression or abuse of power;<sup>2085</sup>
- (ii) Intimidation, extortion and other forms of duress that prey on fear or desperation;<sup>2086</sup>

<sup>2079</sup> *V. C. v. Slovakia*, Application No. 18968/07, Judgement, 8 November 2011, para. 15.

<sup>2080</sup> *Kvočka et al.* Trial Judgment, para. 561.

<sup>2081</sup> War Without Rules 2017, p. 86.

<sup>2082</sup> See e.g., HRW, 'Ukraine: Apparent War Crimes in Russia-Controlled Areas' (3 April 2022); Y. Limaye, 'Ukraine conflict: "Russian soldiers raped me and killed my husband"' (BBC, 11 April 2022); S. Sidner, S. Sidhu and K. Gak, 'Ukraine has accused Russian soldiers of using rape as a tool of war. These two women say justice is hard to come by' (CNN, 10 May 2022); A. Kasatkin, Y. Zhukova and S. Shevchenko, "'Part Of Russia's Arsenal': Allegations Of Rape By Russian Forces In Ukraine Are Increasing' (RFE/RL, 12 April 2022).

<sup>2083</sup> A. Kasatkin, Y. Zhukova and S. Shevchenko, "'Part Of Russia's Arsenal': Allegations Of Rape By Russian Forces In Ukraine Are Increasing' (RFE/RL, 12 April 2022).

<sup>2084</sup> *M. C. v. Bulgaria*, para. 146; *Ongwen* Trial Judgment, para. 2710.

<sup>2085</sup> ICC Elements of Crimes, Article 7(1)(g)-6, Element 1; Article 8(2)(b)(xxii), Element 2; Article 8(2)(e)(vi)-6, Element 2; *Katanga* Trial Judgment, para. 965; *Ntaganda* Trial Judgment, para. 934; ACHPR, Guidelines on Combatting Sexual Violence, p. 14.

<sup>2086</sup> *Ongwen* Trial Judgment, para. 2710; *Ntaganda* Trial Judgment, para. 935; *Akayesu* Trial Judgment, para. 688; *Kunarac et al.* Trial Judgment, para. 747.



- (iii) Detention (whether legal or illegal);<sup>2087</sup>
- (iv) Regular violence committed against detainees (including sexual violence);<sup>2088</sup>
- (v) Capture and restraint of victims;<sup>2089</sup>
- (vi) Psychological violence; and
- (vii) Promises made to the victim, including promises relating to education or employment or promises to spare or benefit family members.<sup>2090</sup>

The following sub-sections will expand on this list and explain certain types of coercion which may be particularly relevant for Ukraine.

### 7.3.5.1 Detention

Detention reflects unequal power structures and is always coercive.<sup>2091</sup> According to international standards, sexual violence in any form of detention or captivity, legal or illegal, vitiates consent.<sup>2092</sup> Thus, rape and other forms of sexual abuse that occur during lawful detention would be coercive. Equally, detention in *ad hoc* facilities, such as privately-owned properties, would be coercive.

A significant amount of the CRSV cases that have occurred throughout the armed conflict in Donbas since 2014 have taken place in the context of detention or some other form of deprivation of liberty (e.g., at checkpoints along the contact line), for instance:

- According to an interview conducted by the UN Human Rights Monitoring Mission in Ukraine (‘HRMMU’) in 2016, “[o]n 12 September 2016, a woman who was travelling via one of the transport corridors in Donetsk region was told by an officer at the entry-exit checkpoint that there was a problem with her permit [...]. An officer put her passport aside, asked her to enter the container with him, after which he closed the window and locked the door. He told her he had noticed her a month before and liked her, and had therefore intentionally made an error while renewing her permit. He then ordered that she should go with him to a hotel and that she would otherwise be kidnapped and buried alive. He then forced her to sit on his lap and touched, smelled and licked her whole body. She was crying and begging him to let her go. After one hour and a half, he agreed to release her on the condition that she would return to the checkpoint, threatening her with blackmail and physical violence”.<sup>2093</sup>
- According to an interview conducted by HRMMU in 2017, “[i]n 2016 a woman, ‘accused’ of ‘espionage’, was detained by armed groups in Luhansk region [and] deprived of liberty. [...]

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<sup>2087</sup> *Ntaganda* Trial Judgment, para. 934; *Katanga & Chui* Decision on the Confirmation of the Charges, para. 434. See also, *Kvočka et al.* Trial Judgment, paras 98, 555; *Kunarac et al.* Appeal Judgment, para. 132; *Kunarac et al.* Trial Judgment, paras 464, 542, 574; *Furundžija* Trial Judgment, para. 271; *Menesheva v. Russia*, Application No. 59261/00, Judgement, 9 March 2006.

<sup>2088</sup> *Kunarac et al.* Trial Judgment, para. 574; *Kvočka et al.* Trial Judgment, para. 561; *Salmanoğlu & Polattaş v. Turkey*, Application No. 15828/03, Judgement, 17 March 2009.

<sup>2089</sup> *Ntaganda* Trial Judgment, para. 943.

<sup>2090</sup> *Kvočka et al.* Trial Judgment, para. 551.

<sup>2091</sup> ICRC, ‘Sexual Violence in Detention’ (February 2017) (‘ICRC, Sexual Violence in Detention Report’), p. 2.

<sup>2092</sup> *Katanga & Chui* Decision on the Confirmation of the Charges, paras 353-354, 434; *Furundžija* Trial Judgment, para. 271; *Kvočka et al.* Trial Judgment, paras 98, 555; *Delalić et al.* Trial Judgment, para. 495; *Kunarac et al.* Appeal Judgment, para. 132; *Kunarac et al.* Trial Judgment, paras 464, 542, 574.

<sup>2093</sup> OHCHR, 16 February 2017 CRSV Report, para. 81.



One evening in the beginning of August the guards brought her to the new officer on duty upon his demand. He told her that the ‘conditions in cells can be very different’, which she perceived as a threat of violence. Then he raped her. From then on, he called her to his office nearly once a week forcing her to perform oral sex. She did not complain to anyone for the fear of retaliation. She was released several months later”.<sup>2094</sup>

- According to an interview conducted by HRMMU in 2018, “[a] man detained in March 2018 [was beaten by interrogators] in the basement for several hours upon his arrival at ‘Izoliatsiia’. Several interrogators strapped him on a table with tape, wrapped electric wires around his right little toe and turned on the electricity. They threatened further harm to him and to his family if he did not tell them about his work for SBU, stating: ‘We will bring your wife here and ten of us will rape her while you watch!’ and ‘we will put electric wires in your ass and penis!’”.<sup>2095</sup>
- Several detainees voiced allegations to HRMMU that ‘Palych’, the person in charge of ‘Izoliatsiia’ between 2016 and February 2018, subjected female detainees to sexual violence including rape: “[o]ne detainee told OHCHR that ‘Palych’ once summoned one of her cellmates, and afterwards she heard screams coming from his office on another floor. The cellmate returned hours later in torn clothes and crying uncontrollably. She refused to talk about what had happened”.<sup>2096</sup>
- CRSV in the context of detention has also been reported following the full-scale Russian invasion of 2022.<sup>2097</sup> For example, a woman alleges that she was raped repeatedly by a Russian soldier who held her at gun point, overnight, in a room away from the people she was sheltering with.<sup>2098</sup> In another instance, a group of girls and women were held in a basement in Bucha during its month-long occupation during which time they were gang-raped repeatedly.<sup>2099</sup>

### 7.3.5.2 Psychological Violence and Abuse of Unequal Power Relations

The factors or conduct that amount to coercion go beyond threats of physical violence and include other forms of psychological violence, oppression and the instilment of fear.<sup>2100</sup> This may occur in a

<sup>2094</sup> OHCHR, 16 February 2017 CRSV Report, para. 97.

<sup>2095</sup> OHCHR, ‘Arbitrary Detention, Torture and Ill-Treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021’ (2 July 2021) (‘OHCHR, Arbitrary Detention, Torture and Ill-Treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021’), Annex II, para. 45.

<sup>2096</sup> OHCHR, Arbitrary Detention, Torture and Ill-Treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021, Annex II, para. 54.

<sup>2097</sup> See e.g., T. John, O. Ochman and S. Sidhu, ‘Russian troops use rape as “instrument of war” in Ukraine, rights groups say’ (CTV News, 22 April 2022); A. Vagianos, ‘Russia Is Using Rape As A Weapon Of War Against Ukraine’ (Harvard Kennedy School Belfer Centre for Science and International Affairs, 21 April 2022); N. Pryazovya and O. Yankovskyi, “‘She went out to collect flowers for her mother and they raped her.’ Evidence of sexual crimes committed by the Russian military in the south’ (Radio Svoboda, 23 April 2022).

<sup>2098</sup> HRW, ‘Ukraine: Apparent War Crimes in Russia-Controlled Areas’ (3 April 2022).

<sup>2099</sup> A. Vagianos, ‘Russia Is Using Rape As A Weapon Of War Against Ukraine’ (Harvard Kennedy School Belfer Centre for Science and International Affairs, 21 April 2022); Y. Limaye, ‘Ukraine Conflict: “Russian Soldiers Raped Me and Killed My Husband”’ (BBC, 12 April 2022); N. Vasilyeva, ‘Nine Women and Girls in Bucha Pregnant After Being Raped by Russian Soldiers, Kyiv Says’ (The Telegraph, 12 April 2022); C. Gall, ‘Bucha’s Month of Terror’ (NYT, 11 April 2022).

<sup>2100</sup> Ntaganda Trial Judgment, para. 934.

broad array of contexts and is particularly likely where there is an unequal power relationship between the perpetrator and the victim. Unequal power relationships are particularly relevant to the Ukrainian situation because the commission of CRSV has been perpetrated by, among others, individuals in positions of authority such as soldiers, police and border guards, whose position places them in a position of power and authority in relation to their victims. In addition, occupation forces have an unequal power relationship with those under their occupation. By definition, this entails an element of control.

Article 438 of the CCU (as it currently stands, and as amended by Draft Bill 7290 (if, and when, it enters into force)) does not specifically refer to unequal power relations. Nevertheless, as Article 438 is to be interpreted in line with international standards, if the relationship between the victim and perpetrator is unequal, this will amount to a situation of coercion that should be taken into account when determining whether voluntary consent was given.

The following is a non-exhaustive list of factors that may be indicative of unequal power relations:

- (i) The perpetrator has an official or unofficial position of authority (e.g., soldiers, detention guards, police officers, guardians or care givers, doctors, teachers, community or tribal leaders, etc.);<sup>2101</sup>
- (ii) The affected person is aware that the perpetrator has previously used violence against them, or a third party;<sup>2102</sup>
- (iii) The affected person has any type of dependency (including financial, legal, professional, familial and/or personal) on the perpetrator;<sup>2103</sup>
- (iv) The affected person is open to exploitation due to certain vulnerabilities or personal characteristics.<sup>2104</sup> Unequal power relations between men and women can also contribute to coercive circumstances; and
- (v) Unequal relations in familial or intimate relationships (e.g., where there is domestic violence or where the perpetrator is the head of the household).<sup>2105</sup>

Considering psychological violence and abuse of unequal power relations requires practitioners to examine the context and circumstances surrounding the CRSV. There are many examples of acts or circumstances which may, individually or collectively, indicate psychological violence or abuse of power that practitioners should document, including:<sup>2106</sup>

- (i) Situations of detention, border crossings or military check-stops;

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<sup>2101</sup> See e.g., *Ntaganda Trial Judgment*, para. 943. See also, *Delalić et al. Trial Judgment*, para. 495; *Kvočka et al. Trial Judgment*, paras 548, 561.

<sup>2102</sup> The Hague Principles on Sexual Violence, p. 11.

<sup>2103</sup> Istanbul Convention Explanatory Report, para. 181; UK Crown Prosecution Service ('CPS'), 'What is Consent?' (undated) ('CPS, 'What is Consent?'), p. 2.

<sup>2104</sup> The Hague Principles on Sexual Violence, p. 11: e.g., sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy or other grounds.

<sup>2105</sup> Istanbul Convention Explanatory Report, para. 181.

<sup>2106</sup> European Institute for Gender Equality, 'Psychological Violence' (undated); CPS, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship' (30 June 2017) ('CPS, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship').

- (ii) In situations of active combat or attack, victims often take shelter from shelling, sniping, the opposing military, etc. in locations where CRSV can take place;
- (iii) Isolation of the victim from others in their group (e.g., taking the victim to another room away from the individuals with whom they are sheltering);
- (iv) Making the victim feel obligated to have sex by threatening to hurt another person or disclose the location where the victim and others are sheltering;
- (v) Using intimidating and aggressive language or gestures (such as yelling, destruction of objects or other aggressive behaviour); and
- (vi) Publicly humiliating, degrading or dehumanising the victim.

In assessing whether a particular act amounts to CRSV, practitioners should consider the abovementioned, and other similar, factors **in their totality**. In some cases, the perpetrator's actions may seem unproblematic if considered in isolation. Cumulatively, however, the existence of these factors may reveal a pattern of controlling and abusive conduct by the perpetrator against the victim.<sup>2107</sup>

The CRSV that has been perpetrated following Russia's invasion of Ukraine involves clear power imbalances between the perpetrator and the victim, for example:

- It has been reported that, on 13 March 2022, a Russian soldier beat and repeatedly raped a woman in the Kharkiv region. She had been sheltering in the basement of a local school with her 5-year-old daughter and her mother, among others, when a Russian soldier forcibly entered the school carrying an assault rifle and pistol. The soldier took her from the basement to a classroom on the second floor where he pointed a gun at her, told her to undress and ordered her to give him oral sex while continuing to hold his gun to her head. He then forced her to stay with him all night and raped her multiple times, once with a knife to her neck.<sup>2108</sup>
- On 28 March 2022, a woman from a village near Kyiv reported that she had been raped in her home by a Russian soldier. One evening, the woman was at home with her husband when they heard footsteps outside. Her husband was shot when he went to check on the noise and two Russian soldiers were at her door. One of the soldiers raped her while her 4-year-old son cried in the next room.<sup>2109</sup>
- Following the month-long occupation of Bucha by Russian soldiers (which began on approximately 4 March 2022), reports emerged that a group of 25 women and girls, some as

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<sup>2107</sup> CPS, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship'.

<sup>2108</sup> HRW, 'Ukraine: Apparent War Crimes in Russia-Controlled Areas' (3 April 2022); D. Sheridan, 'Ukrainian Mother Raped by Russian Soldier as She Sheltered in School' (*The Telegraph*, 3 April 2022).

<sup>2109</sup> OSCE, Report on Violations Committed in Ukraine Since 24 February 2022, p. 76; C. Engelbrecht, 'Reports of sexual violence involving Russian soldiers are multiplying, Ukrainian officials say' (*NYT*, 29 March 2022); C. Philp, "'Russian Soldiers Raped Me as My Terrified Son Cried'" (*The Times*, 28 March 2022).

young as 14, were kept in the basement of a house during which time they were “systematically raped” by Russian soldiers. Nine of them are now pregnant.<sup>2110</sup>

### 7.3.5.3 Taking Advantage of Inherently Coercive Environments

CRSV can also be committed by taking advantage of an inherently coercive environment<sup>2111</sup> where the perpetrator does not directly coerce the victim but takes advantage of a coercive environment that exists independently.<sup>2112</sup> Inherently coercive environments may exist, for instance, when there is a military/ security presence in the area,<sup>2113</sup> in situations of armed conflict or occupation, or in circumstances where there are other ongoing war crimes or crimes against humanity being committed.<sup>2114</sup>

In such situations, while the perpetrator may not have done anything to personally, explicitly coerce the victim (such as by using force or by threatening the victim), or be personally responsible for creating the coercive environment, they nonetheless take advantage of a situation that is inherently coercive to sexually abuse the victim.<sup>2115</sup>

Several factors may contribute to creating a coercive environment, including whether the sexual violence was committed during or immediately following a combat situation and whether the sexual violence was committed together with other crimes.<sup>2116</sup> This would occur, for example, in a situation where soldiers engaged in sexual violence in the immediate aftermath of an armed group’s takeover of a village, which coincided with the commission of other crimes by the soldiers against the villagers (e.g., torture and killings).<sup>2117</sup>

It is common that other coercive circumstances (as described above) will be present in addition to the inherently coercive environment, which converge to create a situation where the victim is unable to provide genuine consent. Accordingly, practitioners must consider these factors in their totality.

The total occupation of Crimea and Donbas since 2014, and the Russian occupation of cities, towns and villages, including Kherson (among others), following the invasion of 24 February 2022, created

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<sup>2110</sup> Y. Limaye, ‘Ukraine Conflict: “Russian Soldiers Raped Me and Killed My Husband”’ (BBC, 12 April 2022); N. Vasilyeva, ‘Nine Women and Girls in Bucha Pregnant After Being Raped by Russian Soldiers, Kyiv Says’ (*The Telegraph*, 12 April 2022); C. Gall, ‘Bucha’s Month of Terror’ (NYT, 11 April 2022).

<sup>2111</sup> ICC Elements of Crimes, Article 7(1)(g)-(i), Element 2; Article 8(2)(b)(xxii)-(i), Element 2; Article 8(2)(e)(vi)-(i), Element 2; CEDAW, General Recommendation No. 35, para. 33; *Karen Tayag Vertido v. the Philippines*, para. 8.9.b(ii)(b); *M.C. v. Bulgaria*, paras 180-181.

<sup>2112</sup> Amnesty International, *Rape and Sexual Violence*, pp. 26-27; ICRC, *Sexual Violence in Detention Report*, p. 2; *Ongwen Trial Judgment*, para. 2710; *Ntaganda Trial Judgment*, para. 935; *Bemba Trial Judgment*, para. 104.

<sup>2113</sup> *Ongwen Trial Judgment*, para. 2710; *Ntaganda Trial Judgment*, para. 935; *Bemba Trial Judgment*, paras 103-104. See also, ECOSOC, “Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict”, para. 25.

<sup>2114</sup> *Ongwen Trial Judgment*, para. 2710; *Ntaganda Trial Judgment*, para. 935; *Bemba Trial Judgment*, para. 104.

<sup>2115</sup> Amnesty International, *Rape and Sexual Violence*, pp. 26-27.

<sup>2116</sup> *Ongwen Trial Judgment*, para. 2710; *Ntaganda Trial Judgment*, para. 945; *Bemba Trial Judgment*, para. 104; *Akayesu Trial Judgment*, para. 688.

<sup>2117</sup> *Ntaganda Trial Judgment*, para. 945.

an inherently coercive environment in those areas, of which perpetrators of acts of sexual violence have been able to take advantage with impunity.<sup>2118</sup>

### 7.3.6 Incapacity

International standards also recognise certain situations in which a person is incapable of giving free, voluntary and genuine consent. This may be due to induced, natural or age-related causes.<sup>2119</sup> Forms of incapacity may also serve as aggravating circumstances.<sup>2120</sup>

Intoxication with alcohol or drugs, whether self-administered or administered by the perpetrator, may render a person incapable of giving genuine consent.<sup>2121</sup> A person may also be affected by a temporary or permanent physical or mental condition that renders them incapable of giving genuine consent. This includes if they were asleep, unconscious or have certain disabilities or conditions affecting their ability to consent or communicate consent. However, a person with physical or mental disabilities or conditions should not be presumed to be incapable of comprehending the nature of the sexual acts or of giving consent.<sup>2122</sup>

Age, including old age,<sup>2123</sup> can also affect a person's ability to give genuine consent;<sup>2124</sup> and can act as an aggravating factor relevant to sentencing.<sup>2125</sup>

Whether the victim's capacity to provide genuine consent was impaired will need to be assessed on a case-by-case basis. For example, this would be the case if the substance caused the victim to be unconscious, unaware of what was happening or otherwise unable to refuse the sexual conduct.

## 7.4 LINKING PERPETRATORS TO ACTS OF CRSV

When the elements of the offence have been established, practitioners will also need to uncover linkage evidence (*see* Section 3.5.3) to prove that the accused perpetrated the CRSV offence. As with

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<sup>2118</sup> See e.g., OHCHR, 16 February 2017 CRSV Report, paras 85-111; CEDAW, Concluding Observations on the 8th Periodic Report of Ukraine, paras 10, 14; War Without Rules 2017, pp. 34, 38-60; Amnesty International, DSV Against Women in Eastern Ukraine, pp. 60-61; B. Lucas, B. Rohwerder and K. Tull, 'Gender and Conflict in Ukraine' (*K4D*, 23 February 2017), pp. 2-3; J. Losh, 'Ukraine's Invisible Scars' (*Politico*, 6 April 2018); HRW, 'Ukraine: Apparent War Crimes in Russia-Controlled Areas' (3 April 2022); B. McKernan, 'Rape as a Weapon: Huge Scale of Sexual Violence Inflicted in Ukraine Emerges' (*The Guardian*, 4 April 2022); N. Paton Walsh, et al., 'In Russian-Occupied Kherson, Allegations of Rape Emerge' (*CNN*, 28 April 2022).

<sup>2119</sup> ICC Elements of Crimes, fns. 16, 51, 64; *Bemba* Trial Judgment, para. 107; *Ntaganda* Trial Judgment, para. 981; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgment, 2 March 2009 ('*Sesay et al.* Trial Judgment'), para. 148; *M.C. v. Bulgaria*, para. 79. See also, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 59; WHO, Guidelines for Medico-Legal Care for Victims of Sexual Violence, Chapter 2, pp. 7-8, 11-12; CPS, 'What is Consent?', p. 2.

<sup>2120</sup> CCU, Article 67(1): "Circumstances aggravating punishment" include (...) 6) "the commission of an offense against a minor, an elderly, or helpless person", [...] 9) "the commission of an offense through the use of a minor, a person of unsound mind or mentally defective person".

<sup>2121</sup> *Sesay et al.* Trial Judgment, para. 148; WHO, Guidelines for Medico-Legal Care for Victims of Sexual Violence, Chapter 2, pp. 7-8.

<sup>2122</sup> See e.g., United Nations Convention on the Rights of the Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 2515, Article 3(1).

<sup>2123</sup> *M.C. v. Bulgaria*, para. 79.

<sup>2124</sup> ICC Elements of Crimes, fns. 16, 51, 64; *Bemba* Trial Judgment, para. 107; *Ntaganda* Trial Judgment, para. 981; *Sesay et al.* Trial Judgment, para. 148.

<sup>2125</sup> CCU, Article 67(1)(6).

other international crimes, perpetrators of CRSV may include those who physically commit a crime themselves, and those, often political leaders or military commanders, who may commit crimes indirectly through others without ever meeting the victim or visiting the scene of the crime.<sup>2126</sup>

When collecting and analysing ‘linkage’ evidence with a view to establishing ‘modes of liability’ for CRSV crimes, practitioners should be careful not to apply different standards to their analysis as compared to other crimes which don’t involve CRSV. A common mistake is to presume CRSV is committed in isolation or randomly by individual fighters opportunistically or based on personal motivation, rather than as part of a broader pattern of crimes linked to higher level perpetrators.<sup>2127</sup> To the contrary, CRSV is committed in similar ways to other international crimes and can invoke the responsibility of those who have committed, aided and abetted, ordered, instigated or planned sexual violence, as well as those military or political leaders who have contributed to common plans to commit or who have failed to prevent or punish crimes committed by their subordinates. Consequently, practitioners should consider the full range of modes of liability when examining potential perpetrators (*see* Section 3.4).

For example:

- Liability for groups of persons, organised groups and criminal organisations (*see* Section 3.4.5.2): the accused was responsible for rape and sexual slavery based on essential contributions to crimes conducted by an armed group pursuant to a common plan to drive out civilians from an area, which inherently involved targeting individuals by acts including killing and raping.<sup>2128</sup>
- Ordering (*see* Section 3.4.5.4): the accused was responsible for ordering multiple acts of rape by numerous direct perpetrators by making comments which encouraged and supervised the rapes, including by saying “first of all make sure you sleep with that girl”.<sup>2129</sup>
- Aiding and abetting (*see* Section 3.4.5.3.2.3): a military commander responsible for aiding and abetting rape through his presence during the crimes and his continued interrogation of the victim after she was raped.<sup>2130</sup>
- Command responsibility (*see* Section 3.4.5.5): a military commander of a prison camp where sexual violence occurred was responsible for the sexual violence since he was aware of their commission and made no efforts to prevent, repress or punish the crimes.<sup>2131</sup>

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<sup>2126</sup> P. V. Sellers, ‘The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation.’, p. 14; S. Brammertz and M. Jarvis (eds), *Prosecuting conflict-related sexual violence at the ICTY* (OUP 2016) (‘Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016)’), pp. 220-221.

<sup>2127</sup> Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016), pp. 34-35, 233.

<sup>2128</sup> *Ntaganda Trial Judgment*, paras 808-811, 825.

<sup>2129</sup> *Akayesu Trial Judgment*, paras 452, 692.

<sup>2130</sup> *Furundžija Trial Judgment*, paras 122, 125-129, 273-275.

<sup>2131</sup> *Delalić et al. Trial Judgment*, paras 736, 737-67, 769-770.



### 7.4.1 Investigating Linkage in CRSV Cases

Linking these individuals to international crimes will usually require evidence that demonstrates the existence of hierarchies that identify those wielding control within those hierarchies. Understanding how to draw such links is helpful when confronted with complex command structures (military or political/administrative). This is particularly so because, in the prosecution of senior leadership cases, the defence may not challenge the fact that a crime was committed (i.e., the ‘crime base’) but, rather, will decide to focus on (rebutting the evidence of) chains of responsibility between the direct perpetrators and the suspect.<sup>2132</sup> As with all international crimes, the general advice provided in Section 3.5.3 should be followed in cases of CRSV.

Assessing the responsibility of mid- or high-level perpetrators invariably involves investigating how the organisational and command culture contributed to the commission of CRSV. International crimes, including CRSV, often occur pursuant to a policy at the highest echelons of power within an organisation. Gathering evidence as to the widespread nature of crimes and the patterns of violations and behaviour can serve as evidence of planning, command, and coordination amongst the high-level perpetrators.

<b>Practitioners should consider pattern evidence to demonstrate policies, planning and coordination:</b>
<ul style="list-style-type: none"><li>• Evidence that the crimes occurred on a large scale.</li></ul>
<ul style="list-style-type: none"><li>• Evidence that similar crimes were repeated across different periods of time and location.</li></ul>
<ul style="list-style-type: none"><li>• Evidence that the crimes occurred according to similar patterns – for example, the capture of civilians after takeovers of territory, sexual violence occurring during house searches to find people supporting Ukrainian armed forces, sexual violence occurring in detention or as part of interrogations.</li></ul>
<ul style="list-style-type: none"><li>• Evidence that the CRSV crimes occurred in the context of other crimes being committed.</li></ul>
<ul style="list-style-type: none"><li>• Evidence that the crimes were targeted towards specific victims.</li></ul>
<ul style="list-style-type: none"><li>• Evidence of involvement of certain units or groups of perpetrators in the crimes.</li></ul>
<ul style="list-style-type: none"><li>• Evidence of policies or propaganda revealing a policy to commit crimes.</li></ul>

Moreover, as discussed in Section 3.4.3, the modes of liability under the CCU and international criminal law require practitioners to consider evidence about the alleged perpetrators’ intent or knowledge/awareness of the crime in question. Thus, practitioners should seek to prove at least that the CRSV crimes were foreseeable to the suspect and, if possible, that the perpetrator(s) intended the CRSV crimes.<sup>2133</sup> Misconceptions that CRSV is an isolated, private and opportunistic crime can have negative impacts on the investigation of these crimes and lead to misplaced conclusions that

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<sup>2132</sup> ICTY Manual on Developed Practices, p. 122.

<sup>2133</sup> Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016), p. 245.

the crimes were not foreseeable to the suspect or that the suspect was not aware they would occur in the ordinary course of events.<sup>2134</sup>

Intent and knowledge/awareness can be inferred from the factual circumstances.<sup>2135</sup> In particular, the general context in which the suspect operated, which made the occurrence of sexual violence more likely, is relevant for assessing awareness and foreseeability of sexual violence.<sup>2136</sup> Practitioners should consider “evidence such as patterns of prior or subsequent sexual violence or specific notice” that sexual violence would occur.<sup>2137</sup> Practitioners should also consider whether the sexual and gender-based violence (‘SGBV’)-related crimes were committed within a broader context of violence, including whether they were part of an attack against a particular nationality or other targeted group. Gathering evidence which shows that the practice of CRSV occurred on a large scale or followed a particular pattern may reveal that the perpetrator was acting according to a specific policy, and by inference that they had intent or knowledge of the crimes.

In addition, intent or knowledge can also be shown by evidence of statements made by the suspect, or other people informing the suspect about the commission of violent crimes, for example:<sup>2138</sup> minutes of meetings,<sup>2139</sup> phone intercepts,<sup>2140</sup> interviews with the suspect,<sup>2141</sup> diaries,<sup>2142</sup> reports on the security situation provided to the suspect,<sup>2143</sup> or evidence from insider witnesses.<sup>2144</sup>

The box below is extracted from the book ‘Prosecuting Conflict-Related Sexual Violence at the ICTY’,<sup>2145</sup> and provides a list of indicators of sexual violence foreseeability. These factors, or a

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<sup>2134</sup> See e.g., *Katanga Trial Judgment*: which acquitted Katanga for the crimes of rape and sexual slavery under the mode of liability other contributions to crimes by a group of person acting with a common purpose, because the SGBV crimes did not fall within the common purpose: *Katanga Trial Judgment*, para. 1664.

<sup>2135</sup> See e.g., *Bemba Decision on the Confirmation of Charges*, para. 149.

<sup>2136</sup> Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016), p. 247.

<sup>2137</sup> ICC, *Policy Paper on Sexual and Gender-Based Crimes* 2014, para. 81; K. Guilford, “Prosecuting Sexual Violence in Conflict and the Future of the Common Criminal Purpose at International Criminal Law” (2018) 2 NZWLJ, p. 197.

<sup>2138</sup> Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016), p. 247.

<sup>2139</sup> In *Gotovina et al.*, the Trial Chamber referred to minutes from three meetings at the Ministry of Defence in August 1995 in determining that Gotovina and Markač were aware of the risk of violent conduct in carrying out the JCE. *Gotovina et al. Trial Judgment*, paras 2374, 2586.

<sup>2140</sup> For example, the Tolimir Trial Chamber supported its conclusion that Tolimir was aware of the ethnic hatred between Bosnian Muslims and Serbs by relying inter alia on a phone intercept between the accused and an unknown person on 20 July 1995 where he used derogatory language. *Tolimir Trial Judgment*, para. 1140 (referring to Exhibit P371a, where the accused said that the ‘[t]he Turks don’t want to negotiate’).

<sup>2141</sup> See e.g., *Šainović et al. Appeal Judgment*, para. 1581 (referring to Exhibit P605), where the Appeals Chamber relied on the information provided by Šainović in an interview with the Prosecution to come to the conclusion that in a meeting in May 1999 he had been informed about the commission of rapes.

<sup>2142</sup> *Šainović et al. Appeal Judgment*, para. 1581 referring to Exhibit P2592, where the Appeals Chamber relied on an extract from a diary containing notes on the issues (including violence against the Kosovo Albanian population) discussed at a meeting with Šainović and other officials.

<sup>2143</sup> See e.g., *Prlić et al. Trial Judgment*, paras 732, 734 (referring to Exhibit P2770), where the Trial Chamber relied on a report from the Radio Interception Group to the accused Stojić and Petković on the commission of crimes, including rapes, beatings, and murder by Croatian Defence Council soldiers during an eviction operation from West Mostar to infer the Accused’s knowledge of the commission of sexual violence and the climate of violence more generally.

<sup>2144</sup> See e.g., *Šainović et al. Appeal Judgment*, para. 1581 (referring to Exhibit P2600), relying on a witness who gave evidence regarding a meeting with high ranking officials at which he reported murders and rapes of civilians by soldiers.

<sup>2145</sup> Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016), pp. 251-253.

combination thereof, depending on the context, could be used to establish the foreseeability of sexual violence.<sup>2146</sup>

#### **Foreseeability and Awareness of SGBV**

Depending on the context, the foreseeability of sexual violence could potentially be proved by one or (more likely) a combination of these factors. They include awareness on the part of the accused of:

- the violent nature of a campaign which renders victims more vulnerable;<sup>2147</sup>
- the existence of a widespread and systematic attack against civilians;<sup>2148</sup>
- the forcible displacement of hundreds of thousands, or the chaotic overall nature of an operation.<sup>2149</sup>
- the separation of men from women, thereby rendering the women more vulnerable;<sup>2150</sup>
- imprisonment, in particular if men and women are held separately<sup>2151</sup> or when the guards are drunk, violent (physically and mentally abusive), and unsupervised, so that they can act with virtual impunity;<sup>2152</sup>
- the violent or unstable character of soldiers under the accused's command, or information that they have been drinking prior to being sent on a mission;<sup>2153</sup>
- ethnic animosity/ prevailing atmosphere of aggression and violence;<sup>2154</sup>
- a 'humanitarian catastrophe';<sup>2155</sup>
- the large number of troops involved in an operation, particularly if coupled with a climate of ethnic animosity;<sup>2156</sup>
- the type of troops involved in the execution of a criminal campaign, for instance paramilitaries or irregular groups with a violent reputation or without training, the lack of checks on their criminal background prior to their deployment or redeployment of troops which had previously committed crimes;<sup>2157</sup>

<sup>2146</sup> Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016), pp. 251-253.

<sup>2147</sup> *Šainović et al. Appeal Judgment*, paras 1581-582; *See also, Popović et al. Trial Judgment*, para. 1088; *Gotovina et al. Trial Judgment*, paras 2373-2374, 2585-2586 (foreseeability arising from the nature of the objective of the JCE and the crimes forming part of the common purpose, particularly if they are of a violent nature).

<sup>2148</sup> *Prosecutor v. Martić*, IT-95-11-T, Trial Judgment, 12 June 2007 ('*Martić Trial Judgment*'), para. 454.

<sup>2149</sup> *Šainović et al. Appeal Judgment*, paras 1581-582, 1591-1592, 1602; *See also, Popović et al. Trial Judgment*, para. 1088.

<sup>2150</sup> *Prosecutor v. Đorđević*, IT-05-87/1-A, Appeal Judgment, 27 January 2014 ('*Đorđević Appeal Judgment*'), para. 922; *Krstić Appeal Judgment*, para. 149 (citing with approval *Krstić Trial Judgment*, para. 616, where the Trial Chamber took into account the vulnerable conditions of the refugees in Potočari— mostly women, children, and elderly who had been separated from the men of military age— to infer the foreseeability of rapes).

<sup>2151</sup> *Đorđević Appeal Judgment*, para. 922.

<sup>2152</sup> *Kvočka et al. Trial Judgment*, para. 327.

<sup>2153</sup> *Delalić et al. Appeal Judgment*, para. 238.

<sup>2154</sup> *Šainović et al. Appeal Judgment*, paras 1581-582, 1591-1592, 1602; *Gotovina et al. Trial Judgment*, paras 2373, 2585; *Tolimir Trial Judgment*, para. 1140; *Stanišić and Župljanin Trial Judgment*, para. 525 (referring to Župljanin's knowledge of 'ethnic tensions' in the region relevant to the Indictment). The case is currently on appeal.

<sup>2155</sup> *Šainović et al. Appeal Judgment*, para. 1581.

<sup>2156</sup> *Tolimir Trial Judgment*, para. 1136.

<sup>2157</sup> *Krstić Trial Judgment*, para. 616; *Krstić Appeal Judgment*, para. 149; *Đorđević Appeal Judgment*, para. 2145; *Stanišić and Župljanin Trial Judgment*, para. 524 (referring to the enrollment of 'seasoned criminals' in a Special Police Detachment as rendering the commission of serious crimes foreseeable to the accused). With regard to the higher risk of sexual violence being committed by paramilitaries as opposed to state forces *see, however*, D. K. Cohen, A. Green, and E. Wood, *War-time Sexual Violence – Misconceptions, Implications, and Ways Forward* (Special Report, United States Institute for Peace 2013) pp. 1– 2; E. J. Wood, 'Rape During War is not Inevitable: Variation in Wartime Sexual Violence' in M. Bergsmo, A. B. Skre, E. J. Wood (eds.), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 398.

- the criminal propensity of the perpetrators, for example, through statements made by the accused,<sup>2158</sup> or through receipt by the accused of reports on the activities of the perpetrators;<sup>2159</sup>
- particularly prejudicial attitudes towards women within a military hierarchy or within communities in question;<sup>2160</sup> and
- the use of sexualized representations of women as war propaganda.<sup>2161</sup>

Other indicators could include:

- the accused played an active role in the operation during which the crimes occurred, such as by supervising the logistical aspects on the ground and was therefore aware of the violent nature of the operation and the vulnerability of the victims;<sup>2162</sup>
- the accused was present on the ground and witnessed the commission of crimes (for instance imprisonment, transportation, mistreatments) or was otherwise aware of factors increasing the vulnerability of victims (for instance separation of men from the women);<sup>2163</sup>
- the accused's leadership position and participation in high-level meetings, which allowed him or her to access information on the occurrence of sexual violence crimes, particularly where those crimes had an open or notorious nature;<sup>2164</sup>
- the accused was informed of (or took) inadequate measures to minimize the risk of sexual violence crimes being committed;<sup>2165</sup>
- the role played by the accused and/ or other JCE members in creating the situation which gave rise to the crimes;<sup>2166</sup>

<sup>2158</sup> *Šainović et al. Appeal Judgment* para. 1581; *Dorđević Trial Judgment*, para. 2148.

<sup>2159</sup> *Martić Trial Judgment*, para. 337; *Šainović et al. Appeal Judgment*, para. 1579. Reports written by NGOs and widely disseminated to the media or sent to the relevant authorities may not be sufficient to establish that the accused in particular was aware of their content. *Šainović et al. Appeal Judgment*, paras 1072, 1580, 1590. See also, *Stanišić and Župljanin Trial Judgment*, para. 524 (where the accused himself enrolled 'seasoned criminals' in a Special Police Detachment).

<sup>2160</sup> See e.g., *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004) Volume 3B, Chapter 3, para. 326 ('The patriarchal hegemony that had existed in Sierra Leone continued and worsened during the conflict evolving in the most macabre manner. The cultural concept that a woman was 'owned' by a man played itself out in many of the violations that women suffered during the conflict').

<sup>2161</sup> See e.g., 'War's Overlooked Victims: Rape is Horrifyingly Widespread in Conflicts All Around the World' *The Economist* (13 January 2011) (describing the prelude to massive sexual violence in the Rwandan genocide: 'In the weeks before the killings began, Hutu- controlled newspapers ran cartoons showing Tutsi women having sex with Belgian peacekeepers, who were seen as allies of Paul Kagame's Rwandan Patriotic Front'). *Akayesu Trial Judgment*, para. 732 ('As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. ... This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi.').

<sup>2162</sup> *Tadić Appeal Judgment*, paras 230-231; *Krstić Trial Judgment*, para. 616; *Krstić Appeal Judgment*, para. 149; *Popović et al. Trial Judgment*, paras 1169, 1303, 1726, 1830 (active involvement); *Tolimir Trial Judgment*, para. 1151.

<sup>2163</sup> *Šainović et al. Appeal Judgment*, para. 1588; See also, *Popović et al. Trial Judgment*, para. 1393 (transport of significant number of prisoners and conditions of detention); *Krstić Trial Judgment*, para. 616; *Krstić Appeal Judgment*, para. 149 (mistreatment); *Stanišić and Župljanin Trial Judgment*, paras 506, 508 (the accused visited the Maniača and Omarska camps and saw detainees showing signs of mistreatment).

<sup>2164</sup> *Prosecutor v. Karemera et al.*, ICTR-98-44-A, *Appeal Judgment*, 29 September 2014 ('*Karemera et al. Appeal Judgment*'), paras 628, 630.

<sup>2165</sup> *Gotovina et al. Trial Judgment*, paras 2374, 2586; *Stanišić and Župljanin Trial Judgment*, paras 463, 503– 504 (Župljanin received information on the commission of rapes and filed criminal reports), 514 (on the formation of a commission to inspect the conditions of detention in the camps in the Prijedor area).

<sup>2166</sup> *Martić Trial Judgment*, paras 342, 454; *Popović et al. Trial Judgment*, paras 1169, 1303, 1830; *Gotovina et al. Trial Judgment*, paras 2373– 2374; 2585– 2586.

- the accused played a role in the creation of an environment of impunity in which the perpetrators acted, which furthered the commission of crimes;<sup>2167</sup>
- the prevalence of sexual violence in a specific and connected armed conflict in the recent past;<sup>2168</sup>
- the culture and ideology of the armed organization and particularly whether it embraces violent crime as opposed to restraining it;<sup>2169</sup> and
- awareness of the commander's attitude and preferences towards the commission of acts of sexual violence and particularly whether he or she chooses to tolerate such acts, for example as a form of compensation or reward for exemplary service, or engages himself or herself in sexual violence.<sup>2170</sup>

*Extract: S. Brammertz and M.J. Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY (OUP 2016), pp. 251-253.*

## 7.5 OBTAINING CORROBORATING EVIDENCE OF CRSV

In order to demonstrate that an act of CRSV has occurred, practitioners will need to obtain evidence of that act. Although evidence is dealt with more broadly in Section 5, given its importance, the issue of corroborative evidence when documenting CRSV crimes is dealt with here.

Corroborating evidence is evidence that strengthens, adds to or confirms already existing evidence.<sup>2171</sup> While corroborating evidence can be useful, it is often difficult to obtain for CRSV cases. CRSV typically happens in isolated locations and situations where the perpetrator is in a position of authority over the victim and the victim is unable to seek help.<sup>2172</sup> In settings where CRSV is prevalent, including within familial or intimate relationships, during detention, armed conflict or under repressive regimes or occupation, the task of establishing and finding eyewitnesses may be onerous, and supporting medical documentation may be difficult or even impossible to obtain.<sup>2173</sup> Similarly, victims may be reluctant or afraid to report CRSV immediately due to stigma and shame within their communities.

It is a settled principle of both international and Ukrainian criminal law that judges may rely on the evidence of a single witness to enter a conviction without the need for corroboration.<sup>2174</sup>

<sup>2167</sup> *Stakić* Appeal Judgment, paras 95– 96 (citing *Stakić* Trial Judgment, paras 603, 615– 616).

<sup>2168</sup> *Milutinović et al.* Trial Judgment, Partially Dissenting Opinion of Judge Chowhan.

<sup>2169</sup> See also, E. J. Wood, 'Conflict- Related Sexual Violence and the Policy Implications of Recent Research' (2015) 894 IRRC, p. 17.

<sup>2170</sup> E. J. Wood, 'Conflict- Related Sexual Violence and the Policy Implications of Recent Research' (2015) 894 IRRC, pp. 15, 21. Obviously these factors are also relevant to the commander's own foreseeability of sexual violence committed by his or her subordinates.

<sup>2171</sup> Legal Information Institute, 'Corroborating Evidence' (Cornell Law School June 2021).

<sup>2172</sup> A. Leotta, 'I Was a Sex-Crimes Prosecutor. Here's Why "He Said, She Said" Is a Myth' (*TIME*, 3 October 2018); The Hague Principles on Sexual Violence, pp. 11, 30, 46.

<sup>2173</sup> Trial International, 'Rape Myths in Wartime Sexual Violence Trials: Transferring the Burden from Survivor to Perpetrator' (2018) ('Trial International, Rape Myths in Wartime Sexual Violence Trials'), pp. 34-41.

<sup>2174</sup> See e.g., Criminal Procedure Code of Ukraine of 13 April 2012 No. 4651-VI ('CPC '), Chapter 4 (Evidence and Proving); *Ntaganda* Trial Judgment, paras 75-76; *Prosecutor v. Haradinaj*, IT-04-84-A, Appeal Judgement, 19 July 2010, paras 145, 219; *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 65; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeal Judgment, 3 July 2002, para. 79; *Prosecutor v. Milošević*, IT-98-29/1-A, Appeal Judgment, 12 November 2009, para. 215; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 220.



While Ukrainian legislation does not require corroborating evidence in addition to victim testimony (such as medical or forensic evidence) to prove cases of sexual violence,<sup>2175</sup> in practice, corroboration is routinely demanded during investigations/prosecutions, which creates unnecessary obstacles to the effective prosecution of CRSV cases in Ukraine.

Thus, while it should not be an evidential requirement, corroborative evidence remains valuable in any criminal prosecution.<sup>2176</sup> Practitioners should therefore be alert to the different types of corroborating evidence while documenting instances of CRSV. These are discussed in detail in Section 5.1.2.

## **7.6 VICTIMS AND IMPACT OF CRSV**

Having discussed the principles associated with understanding and identifying CRSV, this section now turns to providing guidance as to who can be a victim of CRSV; the intersecting factors that affect an individual's experience of CRSV and coercive circumstances; as well as an overview of the impact of CRSV with a focus on the stigma and shame surrounding such violations.

### **7.6.1 Victims of CRSV**

Anyone can be a victim of CRSV.<sup>2177</sup> Practitioners should consider all reported incidents of CRSV without bias, regardless of who the victim is. Each case should be assessed on a case-by-case basis and should take into account the individual circumstances and needs of the victim based on their personal characteristics.

### **7.6.2 CRSV Against Men and Boys, Non-Binary, Transgender and Intersex Persons**

Whilst CRSV disproportionately affects women and girls, it also affects men and boys, as well as non-binary, transgender and intersex persons.<sup>2178</sup> During the conflict in Donbas since 2014, there is evidence that numerous men have been subjected to various forms of CRSV, frequently in situations of detention or deprivation of liberty, including: forced nudity; rape, attempted rape and threats of rape; threats of castration; CRSV as a component of torture or inhuman treatment; insults, humiliation and intimidation of a sexual nature; and threats of sexual violence against family

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<sup>2175</sup> See e.g., CPC, Chapter 4 (Evidence and Proving).

<sup>2176</sup> CPS, 'Domestic Abuse: Legal Guidance' (4 April 2022).

<sup>2177</sup> The Hague Principles on Sexual Violence, p. 5; ACHRP, General Comment No. 4, para. 59.

<sup>2178</sup> The Hague Principles on Sexual Violence, pp. 5, 6; ACHRP, General Comment No. 4, para. 59; *Ntaganda* Trial Judgment, para. 942; *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, para. 86. See also, Institute for International Criminal Investigations ('IICI'), 'Guidelines For Investigating Conflict-Related Sexual And Gender-based Violence Against Men And Boys' (29 February 2019) ('IICI, Guidelines For Investigating Conflict-Related Sexual And Gender-based Violence Against Men And Boys').



members.<sup>2179</sup> For example, a man captured and detained by militants in Donetsk alleged that, as part of incidents of torture and abuse, a man attempted to cut off his genitalia with an electric saw.<sup>2180</sup>

The definitions of rape and sexual violence under Article 438 of the CCU (as it currently stands, and as amended by Draft Bill 7290 (if, and when, it enters into force)) are gender-neutral and are therefore broad enough to cover penetration and any form of genital stimulation perpetrated against men and boys, or by causing men and boys to engage in those sexual acts against another person.

As a consequence of general lack of legal provisions, social stigma and gender norms, it is common for CRSV against men and boys to be discussed in coded language or reported or characterised as other crimes that do not reflect the sexual nature of the conduct.<sup>2181</sup> It is therefore important that these descriptions of CRSV do not get lost or ignored when documenting CRSV.

Where it is possible to do so in a culturally sensitive manner and without doing harm (*see* Section 6.1), practitioners should aim to explore the full scope of crimes committed, avoid mischaracterising the crime and capture the sexual nature of the act of violence and the resulting impact.

### **7.6.3 Vulnerable Categories and Intersectional Discrimination**

How an individual experiences, and is affected by, CRSV will be very specific to the victim themselves, their gender and personal circumstances, the context in which the violation was committed and the relationship and power dynamics between the victim and the perpetrator.

Practitioners should adopt an intersectional approach in order to understand how various forms of inequality and discrimination (such as ethnicity, social-economic status and gender) interact and operate together to create different experiences of CRSV.<sup>2182</sup> These intersecting factors can impact upon how an individual experiences coercion and have an aggregating negative impact on victims of CRSV. Understanding this intersectionality will allow practitioners to be able to deal with violations in a more victim-centred way.<sup>2183</sup> In particular, taking an intersectional approach will enable practitioners to better understand the potential coercive circumstances affecting the victim's ability to consent, and will enable the practitioner to assess the potential harms faced by the victim and implement the most appropriate practices to protect the victim from additional harm caused during the documentation process (*see* Section 6.1).

These intersecting identities and factors include, among others: ethnicity; race; indigenous or minority status; colour; socio-economic status; language; religion or belief; culture; political opinion; national origin; marital and/or maternal status; age; urban/rural location; health status; mental or physical disability; property ownership; sexual orientation; gender identity; illiteracy; armed conflict; occupation; seeking asylum; being a refugee; internal displacement; statelessness;

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<sup>2179</sup> *See e.g.*, War Without Rules 2017, pp. 51-53, 86; OHCHR, 16 February 2017 CRSV Report, paras 65-77, 85-98; Yarmoshchuk, "Rape as a method of torture".

<sup>2180</sup> War Without Rules 2017, p. 52.

<sup>2181</sup> IICI, Guidelines For Investigating Conflict-Related Sexual And Gender-based Violence Against Men And Boys, p. 7; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 267.

<sup>2182</sup> UN Women, 'Intersectional Feminism: What It Means and Why It Matters Right Now' (1 July 2020).

<sup>2183</sup> *See e.g.*, CEDAW, General Recommendation No. 35, para. 12.

migration; heading households; widowhood; living with HIV/AIDS; deprivation of liberty; being in sex work; being sex trafficked; substance abuse; homelessness; geographical remoteness; and stigmatisation of minorities fighting for their rights, including human rights defenders.<sup>2184</sup>

These factors invariably result in each victim experiencing coercion differently. This will be especially relevant in assessing unequal power relations between the perpetrator and victim which may, in the circumstances, amount to coercion. Practitioners should therefore take these factors into account when assessing whether the victim was coerced.

The following is a non-exhaustive list of vulnerable populations that can experience intersectional discrimination and are at a higher risk of CRSV within Ukraine:

- (i) **Sexual orientation and gender identity:**<sup>2185</sup> Globally, but also in Ukraine,<sup>2186</sup> lesbian, gay, bi-sexual, transgender, queer and intersex ('LGBTQI+') individuals face discrimination, hate crimes and violence, including acts of sexual violence, due to their actual or perceived sexual orientation and gender identity.<sup>2187</sup> Russian legislation passed in 2013, which bans so-called propaganda that promotes non-traditional sexual relationships, has been used to

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<sup>2184</sup> See e.g., CEDAW, General Recommendation No. 33, paras 8-9. The Committee has also addressed intersectional discrimination in its views in *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, 28 August 2012, CEDAW/C/52/D/32/2011; *S.V.P. v. Bulgaria*, Communication No. 31/2011, 24 November 2012, CEDAW/C/53/D/31/2011; *Cecilia Kell v. Canada*, Communication No. 19/2008, 27 April 2012, CEDAW/C/51/D/19/2008; *A.S. v. Hungary*, Communication No. 4/2004, 29 August 2006, CEDAW/C/36/D/4/2004; *R.P.B. v. the Philippines*; *M.W. v. Denmark*, Communication No. 46/2012, 21 August 2012, CEDAW/C/63/D/46/2012; HRC, 'Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo' (2 May 2011), paras 21-23; Istanbul Convention, Articles 4, 36(2); Istanbul Convention Explanatory Report, paras 52-53; *E.B. v. Romania*, para. 60; CEDAW, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010), para. 18; HRC, 'Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice: Report of the OHCHR' (30 June 2014) ('HRC, Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice: Report of the OHCHR'), para. 5.

<sup>2185</sup> Gender identity encompasses categories of individuals such as non-binary, transgender or transsexual persons, crossdressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to 'male' or 'female' categories. See e.g., Istanbul Convention Explanatory Report, para. 53; HRC, Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice: Report of the OHCHR, para. 4.

<sup>2186</sup> See e.g., OSCE, Report on Violations Committed in Ukraine Since 24 February 2022, p. 83; OHCHR, 16 February 2017 CRSV Report, para. 107; ADC Memorial, Center for Civil Liberties, 'Violation of LGBTI Rights in Crimea and Donbass: The Problem of Homophobia in Territories Beyond Ukraine's Control' (2016); War Without Rules 2017, p. 44; OHCHR, 'Report on the Human Rights Situation in Ukraine, 16 August – 15 November 2018' (17 December 2018), paras 83, 86; OHCHR, 'Report on the Human Rights Situation in Ukraine, 16 May – 15 August 2019' (12 December 2019), paras 87, 96; OHCHR, 'Report on the Human Rights Situation in Ukraine, 16 August – 15 November 2019' (12 December 2019), paras 67, 83-86; OHCHR, 'Report on the Human Rights Situation in Ukraine, 16 November 2019 – 15 February 2020' (12 March 2020), paras 92, 105-109; OHCHR, 'Report on the Human Rights Situation in Ukraine, 1 August 2021 – 31 January 2022' (22 March 2021), paras 71, 73, 75, 81-83.

<sup>2187</sup> See e.g., International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 22; HRC, 'Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the United Nations Commissioner for Human Rights' (17 November 2001), paras 21, 29; *Young v. Australia*, Communication No. 941/2000, 18 September 2003, CCPR/C/78/D/941/2000, para. 6.1; *X v. Columbia*, Communication No. 1361/2005, 14 May 2007, CCPR/C/89/D/1361/2005, para. 7.2; *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgement, 21 March 2000, para. 28; ICJ, 'Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No.4' (2009), p. 33; ACHPR, '275 Resolution on the Protection against Violence and Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity' (28 April to 12 May 2014) ACHPR/Res.275(LV).

target and discriminate against LGBTQI+ persons and those who support them.<sup>2188</sup> This legislation has been extended to the Ukrainian regions under Russia's control (i.e., Crimea, Donetsk and Luhansk) and can also put LGBTQI+ persons in newly occupied areas of Ukraine at risk of further harm and discrimination.<sup>2189</sup> CRSV may be committed against these individuals in order to punish, terrorise or 'correct' their sexual orientation or gender identity in line with social norms. CRSV against individuals due to their sexual orientation or gender identity is extremely under-documented, and a lack of appropriate services and healthcare mean that they face significant barriers in accessing appropriate support services.<sup>2190</sup>

In addition, LGBTQI+ individuals have the same rights to privacy, protection and confidentiality as other victims. However, because of widespread homophobia, the disclosure of case-related sensitive information may put LGBTQI+ persons at particular risk of physical or other harm. Their sexual orientation and gender identity will therefore be relevant to their very specific protection needs and should be taken into consideration in any risk assessment (*see* Section 6.1.3).

- (ii) **Displaced individuals:** More than 15 million people have fled their homes in Ukraine since the beginning of Russia's invasion, of whom an estimated 6.5 million are internally displaced within Ukraine and over 7.8 million have fled the country.<sup>2191</sup> Both refugees and internally displaced persons ('IDPs') face heightened risks of sexual violence in Ukraine.<sup>2192</sup> Accordingly, practitioners should take such factors into account when documenting sexual violence cases that involve displaced persons.

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<sup>2188</sup> *See e.g.*, OSCE, Report on Violations Committed in Ukraine Since 24 February 2022, p. 83; K. Linthicum, 'Will Russia bring its war on LGBTQ people to Ukraine?' (*Los Angeles Times*, 3 March 2022) ('Linthicum, Will Russia Bring its War on LGBTQ People to Ukraine?').

<sup>2189</sup> *See e.g.*, OSCE, Report on Violations Committed in Ukraine Since 24 February 2022, p. 83; Linthicum, Will Russia Bring its War on LGBTQ People to Ukraine?; OHCHR, 'Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the city of Sevastopol Ukraine, 13 September 2017 to 30 June 2018' (10 September 2018).

<sup>2190</sup> Istanbul Convention Explanatory Report, para. 53.

<sup>2191</sup> IDPs: UN High Commissioner for Refugees ('UNHCR'), 'Ukraine' (figure last updated 28 October 2022) (last accessed 6 December 2022). Refugees: UN High Commissioner for Refugees ('UNHCR'), 'Ukraine Refugee Situation' (figure last updated 29 November 2022) (last accessed 6 December 2022). *See also*, OSCE, 'Report on Violations Committed in Ukraine Since 24 February 2022', p. 77; OHCHR, 'Update on the human rights situation in Ukraine Reporting period: 24 February – 26 March' (28 March 2022), para. 1.

<sup>2192</sup> *See e.g.*, OSCE, Report on Violations Committed in Ukraine Since 24 February 2022, pp. 77, 85; UNHCR, 'Statement on Risks of Trafficking and Exploitation Facing Refugees from Ukraine Attributed to UNHCR's Assistant High Commissioner for Protection' (12 April 2022); OHCHR, Update on the Human Rights Situation in Ukraine Reporting Period: 24 February – 26 March, para. 42.

- (iii) **Sex workers:** Sex work is highly stigmatised in Ukraine<sup>2193</sup> and violence against sex workers is prevalent.<sup>2194</sup> They face abuse from their clients, pimps and the police.<sup>2195</sup> The vulnerability of sex workers in Ukraine is further exacerbated by the fact that sex work is criminalised,<sup>2196</sup> which hinders their ability to seek assistance for any violence or abuse they may face.<sup>2197</sup> The prevalence of women engaged in sex work increased significantly in the conflict-affected areas of Donbas from 2014, and included women engaged in “survival sex” with soldiers (i.e., sex in exchange for food or protection) or because it has become one of the only available means of making a living in those areas.<sup>2198</sup>

Sex workers may be subject to numerous intersecting vulnerabilities. For instance, a female sex worker may also be: a victim of domestic violence; a migrant; homeless; HIV positive; a substance-abuser; etc. As a result, each sex worker’s experiences of what constitutes coercive circumstances, as well as how they respond to such circumstances, will differ from one individual to another. They may, for example, avoid reporting incidents of sexual violence to the authorities as that may put them at risk of prosecution for an administrative offence;<sup>2199</sup> being subjected to inappropriate/degrading treatment by the police; or further harm from their pimp or intimate partner. Accordingly, practitioners should take such factors into consideration and assess the potential risks to the victim’s safety and security when documenting sexual violence cases that involve sex workers (*see* Section 6.1.3).

- (iv) **HIV positive status:** According to UNAIDS, Ukraine bears the second-largest HIV epidemic in Eastern Europe and Central Asia, which is geographically concentrated in seven administrative regions, six of which are located in the South and East (areas where hostilities are currently prevalent).<sup>2200</sup> HIV positive individuals may be vulnerable to sexual violence (e.g., they may be exploited by an abuser who uses this vulnerability to take advantage of the victim) or they may face specific threats (such as social ostracization or stigmatisation in their community) when reporting sexual violence, which needs to be taken into account during risk assessments (*see* Section 6.1.3). They may also require

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<sup>2193</sup> See e.g., Amnesty International, *DSV Against Women in Eastern Ukraine*, pp. 65-67; J. Henn, ‘Ukraine’s Ticking Time Bomb: Women, War and HIV’ (*Ms. Magazine*, 16 March 2022) (‘Henn, Ukraine’s Ticking Time Bomb: Women, War and HIV’); V. Costa-Kostritsky, ‘Ukraine: Sex Work in Times of War’ (*Open Democracy*, 3 April 2017) (‘Costa-Kostritsky, Ukraine: Sex Work in Times of War’).

<sup>2194</sup> See e.g., Amnesty International, *DSV Against Women in Eastern Ukraine*, pp. 65-67; Henn, *Ukraine’s Ticking Time Bomb: Women, War and HIV*; Costa-Kostritsky, *Ukraine: Sex Work in Times of War*; Ukrainian Centre for Social Reforms (‘UCSR’), ‘Gender-Based Violence In The Conflict-Affected Regions Of Ukraine’ (2018) (‘UCSR, Gender-Based Violence In The Conflict-Affected Regions Of Ukraine’), p. 34.

<sup>2195</sup> See e.g., Amnesty International, *DSV Against Women in Eastern Ukraine*, pp. 65-67; Henn, *Ukraine’s Ticking Time Bomb: Women, War and HIV*; Costa-Kostritsky, *Ukraine: Sex Work in Times of War*.

<sup>2196</sup> Prostitution is an administrative offence which carries a penalty of a fine and “pimping or involving a person into prostitution” is a criminal offence punishable by imprisonment up to 15 years: *Code on Administrative Offences of Ukraine*, Article 181-1; CCU, Article 303. See also, Amnesty International, *DSV Against Women in Eastern Ukraine*, p. 65.

<sup>2197</sup> Amnesty International, *DSV Against Women in Eastern Ukraine*, p. 65.

<sup>2198</sup> See e.g., Amnesty International, *DSV Against Women in Eastern Ukraine*, pp. 65-67; Henn, *Ukraine’s Ticking Time Bomb: Women, War and HIV*; Costa-Kostritsky, *Ukraine: Sex Work in Times of War*; UCSR, *Gender-Based Violence In The Conflict-Affected Regions Of Ukraine*, p. 34.

<sup>2199</sup> *Code on Administrative Offences of Ukraine*, Article 181-1 with a penalty of a fine.

<sup>2200</sup> See e.g., UNAIDS, ‘Global AIDS Monitoring 2019: Ukraine’ (UNAIDS 2019), p. 1; UNAIDS, ‘Country Factsheet: Ukraine 2020’. See also, J. Henn, ‘Ukraine’s Ticking Time Bomb: Women, War and HIV’ (*Ms. Magazine*, 16 March 2022).

specific medical treatment (including post-exposure prophylaxis) or have specific protection concerns which will need to be considered by practitioners. In addition, stigma against HIV positive individuals and a lack of governmental support, inclusive health and education initiatives and legislative protections add to increased stigma and fear in coming forward with allegations of CRSV.<sup>2201</sup>

#### 7.6.4 Impact of CRSV

The long and short-term impact of CRSV can be severe and sometimes life-threatening. Injuries from rape and other acts of sexual violence may be less visible than those caused by other kinds of violence, yet a victim may still suffer long-term physical and psychological consequences.<sup>2202</sup> It has been recognised that the psychological harm suffered by victims of sexual violence “may often be more pervasive and permanent in its effect than any physical harm”.<sup>2203</sup>

The impacts of CRSV can be physical, psychological, social or socio-economic and legal. These impacts are not limited to the victim, and can harm families, family communities and communal structures.<sup>2204</sup> They may also be intergenerational (e.g., where victims of harm pass on feelings of shame or stigma to their children as a result of trauma inflicted by their experiences of CRSV).<sup>2205</sup> In this way, CRSV can damage or even destroy communities, inflicting lasting effects upon all members.<sup>2206</sup>

Practitioners should seek to gather impact evidence throughout the documentation process. Evidence of impact may be an indicator, and provide corroborating evidence (*see* Section 5.1.2.3), that CRSV has occurred and warrants further examination. Impact evidence is also important during any risk assessment (*see* Section 6.1.3), as well as during trial and in sentencing.

Impact evidence can be a crucial factor in proving that the harm inflicted was sufficiently severe so as to satisfy the elements of the crime. If CRSV is charged as torture, for example, evidence that the victim was subjected to the infliction of severe pain and physical or mental suffering will be needed (*see* Section 3.2.6.1).<sup>2207</sup>

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<sup>2201</sup> See e.g., N. Semchuk and A. Tolopilo, ‘Implementing the REAct Project in Ukraine: Key Populations’ Rights Violations Identified in the Context of HIV/TB and Response to Them’ (Alliance for Public Health, November 2019-October 2020), pp. 47-55; Alliance for Public Health, ‘Annual Report, 2020’.

UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 42; WHO, ‘Violence Against Women’ (9 March 2021); *Aydin v. Turkey*, para. 83; ACHRP, General Comment No. 4, para. 60.

<sup>2203</sup> *R. v. McCraw* (1991) 3 SCR 72 (Canada).

<sup>2204</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 25-27; Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 20; HRC, ‘Violence Against Women, a War Legacy in Bosnia and Herzegovina – UN Special Rapporteur’ (6 November 2012).

<sup>2205</sup> WHO, ‘Violence Against Women’ (9 March 2021); UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 20.

<sup>2206</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 25-27.

<sup>2207</sup> ICC Elements of Crimes, Article 7(1)(f), Element 1.



## 7.7 **BEST PRACTICE APPROACHES TO DOCUMENTING CRSV**

Society's understanding of CRSV, and consequently how CRSV cases are handled during documentation, investigations and prosecutions, is influenced by misconceptions and false beliefs. This, in turn, perpetuates a culture in which sexual violence can continue unabated. Separating these falsehoods from the facts is crucial to stopping the pervasive CRSV in Ukraine and ensuring that victims of CRSV are able to access meaningful justice.

Accordingly, a victim-centred approach to documentation means that practitioners should ensure that no aspect of their documentation activities or assessment of information is affected by their personal views about sexual violence, gender or other stereotyping against women, or any other intersectional factors (*see* Section 6).<sup>2208</sup> The following sub-sections delineate practical instructions to ensure survivor-centred practices and procedures are followed throughout the criminal justice process by:

- (i) Following a best practice approach to collecting evidence of CRSV;
- (ii) Understanding stigma and shame; and
- (iii) Ending common myths, assumptions and stereotypes.

These sections should be read alongside those set out, above, in Section 6.

### 7.7.1 **Best Practice in Documenting CRSV**

#### 7.7.1.1 *Documenting Coercion and Coercive Circumstances*

Documenting coercion and coercive circumstances requires a context-based analysis. This might include exploring the following:

- The complete details of the victim (name, date and place of birth, address, nationality, education level, marriage status, personal circumstances, etc);<sup>2209</sup>
- Whether the victim was vulnerable due to any factors considered by the perpetrator to be strategic disadvantages, such as the affected person's sex, sexual orientation, gender identity, age, disability, poverty, class, social status, ethnicity, race, religion, illiteracy or other grounds.<sup>2210</sup>
  - Does the victim have any concerns, fears or anxieties that you should be aware of?

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<sup>2208</sup> CoE, Norwegian National Police Directorate, 'Preventing and Combating Domestic Violence against Women, A learning Resource for Training Law Enforcement and Justice Officers' (January 2016) ('Preventing and Combating Domestic Violence against Women, A learning Resource for Training Law Enforcement and Justice Officers'), p. 43; UK Foreign & Commonwealth Office, Preventing Sexual Violence in Conflict Initiative, the Foreign, Commonwealth and Development Office, 'Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence' (19 September 2017) ('Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence'), p. 26; CPS, 'Rape and Sexual Offences – Annex A: Tackling Rape Myths and Stereotypes' (CPS, 21 May 2021) ('Rape and Sexual Offences – Annex A: Tackling Rape Myths and Stereotypes'); Istanbul Convention Explanatory Report, para. 192; *Karen Tayag Vertido v. the Philippines*, paras 8.5-8.6, 8.8; *R.P.B. v. the Philippines*, paras 8.11, 9(b)(iv); UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, pp. 31-35.

<sup>2209</sup> See e.g., V. Nainar, 'Manual Litigation Strategies for Sexual Violence in Africa' (REDRESS, September 2015) ('REDRESS, Manual Litigation Strategies for Sexual Violence in Africa'), p. 71.

<sup>2210</sup> The Hague Principles on Sexual Violence, p. 11.



- The details of the violence, including:
  - When and where did the incident take place?
  - What happened?
  - How many perpetrators were involved?
- Details of any coercive circumstance or environment, including:
  - Whether there was an ongoing armed conflict, or occupation at the time of the sexual violence;
  - Whether weapons, occupation forces or military activity were present in the area where the sexual violence occurred;
  - What type of weapons were observed and what was the nature of the military activity;
  - Whether the perpetrator(s) were armed and with what;
  - Whether they used or threatened to use those weapons during the commission of the offence;
  - Whether the victim was detained, held against their will or restrained in any way;<sup>2211</sup>
  - The presence of psychological intimidation, blackmail or threats of any kind (e.g., threat of physical violence, threat of sexual violence, threats to family members, threat of losing a job, etc.);<sup>2212</sup>
  - Whether the victim was underage, under the influence of drugs or alcohol, mentally incapable of understanding the situation or injured or disabled making them incapable of giving voluntary consent.<sup>2213</sup>
- A description of the appearance, demeanour and language of the perpetrator(s), and identity, if known, including the nature of the relationship between the victim and perpetrator (including any relationship of power or authority):
  - What was the perpetrator(s) wearing? Were they wearing a uniform? Did they have any identifiable insignia on their clothing?
  - Did the perpetrator(s) speak to the victim or one another? If so, did the victim understand what they said? What language did they speak? Can the victim identify it? Were there any distinguishing features of the perpetrator's language, such as an identifiable dialect?
  - What did they say?
  - Did the perpetrator(s) tell the victim their names, or refer to one another by name?
  - Had the victim seen the perpetrator(s) before? If so, when, where and under what circumstances?
  - What was the perpetrator(s) attitude/demeanour like prior to, during and after the incident?
  - Did the perpetrator(s) arrive in a vehicle? If so, does the victim know what type or can the victim describe it?
  - Was anyone else present during the incident?

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<sup>2211</sup> *Kunarac et al. Appeal Judgment*, paras 3, 113, 132.

<sup>2212</sup> E.G. Krug, et al. (eds), 'World Report on Violence and Health' (WHO 2002), p. 149.

<sup>2213</sup> ICC Elements of Crimes, fns. 16, 51, 64; *Bemba Trial Judgment*, para. 107; *Ntaganda Trial Judgment*, para. 981.

- Did the perpetrator commit an act of sexual violence against anyone else during the incident in which the victim suffered?
- A detailed description of the physical and mental harm suffered as a result of the violence.<sup>2214</sup>

### 7.7.1.2 *Linguistic or Cultural Specificities*

When conducting interviews, practitioners should be aware that CRSV is often referred to in culturally or linguistically specific ways, which may not be easily recognised. For example, victims or witnesses may use euphemisms to avoid using words like sex and penis, or to describe the violence.

### 7.7.2 Understanding Stigma and Shame

A common impact of CRSV crimes is stigma and shame felt by the victim. Stigma entails negative, gender-based stereotypes that result in the victim's marginalisation, shifting blame from the perpetrator to the victim.<sup>2215</sup> The stigma and shame surrounding CRSV is highly context specific,<sup>2216</sup> and may arise on personal, interpersonal, community or structural levels.<sup>2217</sup> This means that victims of CRSV may internalise stigma and shame themselves,<sup>2218</sup> or may suffer these impacts as a result of the actions of their families, wider communities or the authorities investigating and prosecuting crimes.<sup>2219</sup>

Stigma and shame are significant barriers to justice for victims of CRSV in Ukraine.<sup>2220</sup> Addressing and combatting stigma requires a victim-centred approach (*see* Section 6), which places the victim's confidentiality, safety and dignity at the forefront of the criminal justice process.<sup>2221</sup> A practitioner's reaction to reports of CRSV should not reinforce stigma or shame, or reflect gender bias or stereotypes. The practitioner's reaction is critical to ensuring the victim has confidence in how they will be treated throughout the documentation, investigative and criminal justice processes, and

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<sup>2214</sup> See e.g., REDRESS, *Manual Litigation Strategies for Sexual Violence in Africa*, p. 71.

<sup>2215</sup> Trial International, *Rape Myths in Wartime Sexual Violence Trials*, p. 22.

<sup>2216</sup> Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 18; UNODC, *Handbook on Effective Prosecution Responses to Violence Against Women and Girls*, p. 45.

<sup>2217</sup> Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 18; UNODC, *Handbook on Effective Prosecution Responses to Violence Against Women and Girls*, p. 45.

<sup>2218</sup> Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 18; UNODC, *Handbook on Effective Prosecution Responses to Violence Against Women and Girls*, pp. 45-46.

<sup>2219</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 26, 115; OHCHR, 'Protection of Victims of Sexual Violence: Lessons Learned' (2019), p. 19.

<sup>2220</sup> See e.g., CEDAW, Concluding Observations on the 8th Periodic Report of Ukraine, para. 14; War Without Rules 2017, p. 73; M. Krauzman, 'Weaponisation of Female Bodies: Inaccurate Reports of Sexual Violence in the Donbas Conflict' (*Security Distillery*, 5 February 2021); Yarmoshchuk, "Rape as a method of torture"; C. Dolan, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict' (Briefing paper prepared for the workshop held at the Overseas Development Institute, London, 14 May 2014), p. 4.

<sup>2221</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 138.

whether they are believed or thought to be responsible.<sup>2222</sup> This means that practitioners should remain objective and non-judgemental at all times and accept the victim's evidence at face value.<sup>2223</sup>

There are a number of ethical and practical principles that are particularly important when documenting CRSV crimes, which practitioners should keep in mind, many of which will be explored in the sections that follow.

### **7.7.3 Ending Myths, Assumptions and Stereotypes**

#### **7.7.3.1 *Promiscuity and Virginity: Irrelevance of Prior Sexual Conduct***

Consent can only be considered genuine if it is given voluntarily, consciously and freely in relation to a specific sexual act.<sup>2224</sup> It will not suffice if the person has consented to similar conduct; if they consented to the relevant activity/activities on a previous occasion; if they initially consented but later withdrew that consent; or if the nature of the sexual activity changed without their consent.<sup>2225</sup>

Accordingly, questions about a victim's prior sexual conduct are irrelevant to assessing whether they consented to the specific sexual act in question.<sup>2226</sup> In addition, no assumptions should be inferred about the victim or witness's credibility, character or predisposition to sexual availability from their prior sexual conduct.<sup>2227</sup> Practitioners should therefore focus on establishing that the act of a sexual nature occurred (e.g., "what happened?", "where did he touch you?", "what did they ask you to do?"), and that it occurred under coercive circumstances.<sup>2228</sup> Questions about sexual history, prior partners and relationships (e.g., "were you a virgin?", "have you had sex with the perpetrator before?", "how many people have you had sex with?", "do you usually have sex with men or women?"),<sup>2229</sup> are irrelevant to proving the crime. This includes questions relating to the victim's previous sexual conduct with the perpetrator, including situations within intimate or familial relationships.<sup>2230</sup>

Such questions are often used to undermine a victim's credibility and are rooted in gender bias and stereotyping that reflect an unfounded assumption that victims of CRSV are more likely to have

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<sup>2222</sup> Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 19; UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, pp. 41-42.

<sup>2223</sup> Preventing and Combating Domestic Violence against Women, A learning Resource for Training Law Enforcement and Justice Officers, p. 43; GBV Pocket Guide, p.18; Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 26; Rape and Sexual Offences – Annex A: Tackling Rape Myths and Stereotypes; Istanbul Convention Explanatory Report, para. 192; *R.P.B. v. the Philippines*, paras 8.11, 9(b)(iv); UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 29.

<sup>2224</sup> The Hague Principles on Sexual Violence, p. 11.

<sup>2225</sup> The Hague Principles on Sexual Violence, p. 6, fn. 4.

<sup>2226</sup> UN Women, Handbook for Legislation on Violence Against Women, p. 42; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 62; The Hague Principles on Sexual Violence, p. 45, para. 13; Istanbul Convention Explanatory Report, para. 278.

<sup>2227</sup> ICC Rules of Procedure and Evidence, Rule 70; Istanbul Convention Explanatory Report, paras 277-278; The Hague Principles on Sexual Violence, p. 45, para. 13; UNGA, 'Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women' (31 March 2011), para. 15; UN Women, Handbook for Legislation on Violence Against Women, p. 42.

<sup>2228</sup> See e.g., Rome Statute, Articles 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1; CCU, Article 438; Draft Bill 'On amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine' of 15 April 2022 No. 7290, Article 438.

<sup>2229</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 62.

<sup>2230</sup> See e.g., *R. v. Goldfinch* (2019) SCC 38 (Canada), paras 44-45, 56.

consented if they have had prior consensual sexual conduct, either with the perpetrator or others. This is humiliating, risks re-traumatising the victim<sup>2231</sup> and attributes blame to the victim's supposed immorality, rather than the perpetrator's depravity.<sup>2232</sup> Certain marginalised groups are more likely to face this form of stereotyping (e.g., sex workers, HIV positive persons, LGBTQI+ individuals). These stereotypes are unfounded.

### 7.7.3.2 *Irrelevance of the Victim's Conduct or Behaviour*

The conduct or behaviour of the victim (e.g., what they were wearing; whether they had make-up on; their sexuality; whether they had been drinking/taking drugs; or their engagement in sex work) is irrelevant to any assessment of consent.<sup>2233</sup> Similarly, the fact that a victim voluntarily frequented 'dark', 'isolated' or 'dangerous' places,<sup>2234</sup> or entered a perpetrator's room, residence or house, is not indicative of consent or 'risky' behaviour.<sup>2235</sup>

Shame, judgement and victim blaming appear to be a common experience of victims of CRSV in Ukraine.<sup>2236</sup> For example, research conducted by two Ukrainian civil society organisations, La Strada and the Geneva Centre for the Democratic Control of Armed Forces, into the Ukrainian criminal justice system's response to violence against women and domestic violence found that, of those interviewed, "58% of police officers, 61% of prosecutors, and 62% of judges in Ukraine tend to believe that victims of sexual violence are sometimes responsible for their own victimization".<sup>2237</sup>

Focus should remain on the behaviour of the perpetrator and questioning should take care to avoid unfairly blaming the victim for the perpetrator's actions. Any questions from the practitioner such as "what were you wearing", "were your clothes appropriate", "why did you go back to his house if you didn't want to have sex" during interviews will reinforce these negative stereotypes and contribute to the continued underreporting of CRSV cases in Ukraine.<sup>2238</sup>

### 7.7.3.3 *Flight, Fright or Freeze: Irrelevance of Behaviour During and After Sexual Violence*

There is no correct way for a victim to behave during or after sexual violence and there is a broad spectrum of responses that will be influenced by a multitude of factors. There is no requirement for the victim to clearly say "no" or to physically resist.<sup>2239</sup> Passivity (e.g., where a victim freezes and/or

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<sup>2231</sup> See e.g., Istanbul Convention, Article 54; Istanbul Convention Explanatory Report, paras 277-278.

<sup>2232</sup> Trial International, Rape Myths in Wartime Sexual Violence Trials, p. 25; UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 33.

<sup>2233</sup> Trial International, Rape Myths in Wartime Sexual Violence Trials, p. 25; UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 33.

<sup>2234</sup> UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 33.

<sup>2235</sup> Georgetown Law, 'Myths and Facts About Sexual Violence'.

<sup>2236</sup> See e.g., Amnesty International, DSV Against Women in Eastern Ukraine, p. 20; UCSR, Gender-Based Violence In The Conflict-Affected Regions Of Ukraine, pp. 31, 34; Yarmoshchuk, "Rape as a method of torture".

<sup>2237</sup> The Geneva Centre for the Democratic Control of Armed Forces ('DCAF'), La Strada-Ukraine, 'Criminal Justice Practice and Violence against Women: Assessment of the Readiness of the Ukrainian Criminal Justice System to Implement the Principles of the Istanbul Convention' (2017), pp. 45-46.

<sup>2238</sup> See e.g., Concluding Observations on the 8th Periodic Report of Ukraine, para. 14; War Without Rules 2017, p. 73.

<sup>2239</sup> Trial International, Rape Myths in Wartime Sexual Violence Trials, pp. 34-35; UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 32; *E.B. v. Romania*, para. 56; *M.C. v. Bulgaria*, paras 143, 156, 166; ICC Rules of Procedure and Evidence, Rule 70(c).

does not call for help) is not a sign of voluntary participation in an act of sexual violence,<sup>2240</sup> especially given that the victim may not have said “no” because they felt it was not safe to resist.

If there is evidence that a coercive behaviour or environment existed, consent cannot be inferred by reason of any words or conduct of the victim.<sup>2241</sup> Practitioners should not, therefore, base their assessment of the victim’s credibility and/or reliability on their own assumptions of typical behaviour in such situations.<sup>2242</sup> Instead, they should undertake a context-based documentation process, considering the coercive circumstances surrounding the sexual violence.<sup>2243</sup>

Victims may submit to CRSV for reasons associated with the unique, coercive environment surrounding the violence. They may have been wholly overpowered by the physical strength of their abuser. They may have been abducted or detained in an isolated location. They may submit based on a genuine fear rooted in the perpetrator’s previous violent behaviour, because the perpetrator was in a position of authority or power or because the perpetrator has made certain threats towards the victim or their family. They may be afraid of escalating the situation, or believe that actively resisting might provoke even more violent, abusive behaviour. A victim may be unable to fight back because they are paralysed with fear,<sup>2244</sup> or choose to not resist as a coping mechanism for dealing with the trauma of being sexually assaulted.<sup>2245</sup>

#### 7.7.3.4 Active Participation and Physiological Responses

A victim’s active participation in the sexual act or any physiological reaction (such as an orgasm, erection or ejaculation) does not indicate consent.<sup>2246</sup> Having a physiological reaction cannot be controlled and is not an indicator that the victim enjoyed the act or consented. Therefore, questions, such as: “did you enjoy it,” “did you have an erection,” “did you have an orgasm,” are biased, unfair and rooted in gender stereotypes that reveal the person who poses them is not impartial.

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<sup>2240</sup> *E.B. v. Romania*, para. 56; ICC Rules of Procedure and Evidence, Rule 70(c); Group of Experts on Action against Violence against Women and Domestic Violence (‘GREVIO’), ‘GREVIO Baseline Evaluation Report Sweden on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Sweden’ (21 January 2019), para. 181; UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 32.

<sup>2241</sup> See e.g., ICC Rules of Procedure and Evidence, Rule 70; Istanbul Convention Explanatory Report, paras 191-192. See also, *R.v. Barton* (2019) SCC 33 (Canada), paras 98, 107, 109.

<sup>2242</sup> Istanbul Convention, Article 36; Istanbul Convention Explanatory Report, para. 192; Amnesty International, ‘Case Closed: Rape and Human Rights in the Nordic Countries’ (March 2010), p. 148-149, 150; *Karen Tayag Vertido v. the Philippines*, para. 8.5; CEDAW, General Recommendation No. 35, para. 26(b)(c).

<sup>2243</sup> The Hague Principles on Sexual Violence, p. 14; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 44.

<sup>2244</sup> Government of Ontario, ‘Dispelling the Myths about Sexual Assault’ (8 April 2019); UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 32.

<sup>2245</sup> *M.C. v. Bulgaria*, para. 126; *Kunarac et al.* Trial Judgment, para. 646; *Karen Tayag Vertido v. the Philippines*, para. 8.5; Georgetown Law, Myths and Facts About Sexual Violence.

<sup>2246</sup> The Hague Principles on Sexual Violence, p. 45; *Kunarac et al.* Trial Judgment, paras 644-647; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 272. See e.g., *R. v. Ewanchuk* (1999) 1 SCR 330 (Canada).

#### 7.7.3.5 *Subsequent Behaviour*

How the victim reacted after an act of CRSV (such as whether they remained in the location or ran away, whether they acted upset or not, whether they gave birth to a child conceived during rape or whether they told anyone about the sexual violence) may provide evidence that the CRSV occurred but should not be used to infer the victim's consent. The victim's subsequent sexual conduct with the perpetrator and/or others is equally irrelevant.<sup>2247</sup>

#### 7.7.3.6 *No Adverse Inference from Delayed Reporting*

Failure or delay in reporting acts of CRSV, including not revealing all the facts immediately or leaving out or minimising certain acts, does not imply that a victim is lying or lacks credibility.<sup>2248</sup> Practitioners should therefore draw no adverse inferences or make assumptions as to the credibility of victims who have delayed reporting their case.

Reporting of CRSV crimes is often delayed for many reasons, including a lack of understanding about what CRSV is and if it has occurred; the ongoing armed conflict which may make reporting impossible; the influence of trauma upon a victim; fear of retaliation; fear of not being believed or being blamed, stigmatised and re-traumatised; shame; shock;<sup>2249</sup> the length of criminal proceedings and not knowing what will happen to their case once reported; the economic cost of having to pay for transport related to the documentation process, investigation and prosecution; or criminal justice systems that discourage reporting or prosecution, for example, by failing to adopt gender-sensitive practices in police stations.

Victims of CRSV from certain vulnerable categories may have additional and intersecting reasons why they may choose not to report an incident of CRSV (*see* Section 7.6). For example, a sex-worker who has become a victim of CRSV may delay reporting, or choose not to report, through fear of their status as a sex-worker being revealed to the authorities or the community. For the same reasons, victims may not reveal everything or even leave out the worst acts during interviews. Moreover, feelings of embarrassment, emasculation and fear of being classified as homosexual may prevent male victims of CRSV from reporting the crimes committed against them.<sup>2250</sup>

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<sup>2247</sup> ICC Rules of Procedure and Evidence, Rules 70(d), 71.

<sup>2248</sup> Directive 2012/29/EU of the European Parliament and of The Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, L 315/57, 14 November 2012 ('Directive 2012/29/EU'), Preamble, para. 25. *See also*, 'CPS Interim Guidelines on Prosecuting Cases of Child Sexual Abuse – England and Wales' in UNODC, *Handbook on Effective Prosecution Responses to Violence Against Women and Girls*, pp. 46-47.

<sup>2249</sup> Georgetown Law, *Myths and Facts About Sexual Violence*.

<sup>2250</sup> C. Dolan, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict' (Briefing paper prepared for the workshop held at the Overseas Development Institute, London, 14 May 2014), p. 4.



#### 7.7.3.7 Hymen Examination

Hymen examination (or virginity testing) is the practice of assessing a person's 'virginity' based on the state of their hymen.<sup>2251</sup> International standards make it clear that virginity testing should not be undertaken to establish whether a victim has been raped or sexually abused.<sup>2252</sup>

Consequently, practitioners should refrain from any examination into, or questions relating to, the state of the victim's hymen. That said, medical examinations to examine female genitalia for signs of sexual assault (such as injury or DNA deposits) may be useful corroborating evidence where the purpose of that examination is to evaluate for and treat injuries, and not to assess 'virginity' (*see* Section 7.5).<sup>2253</sup> Accordingly, if practitioners are approached by a victim of sexual violence, they should help them seek medical treatment from a reputable medical practitioner who can also conduct a medical examination that will be admissible in a court of law (*see* Section 6.5, above, for more information on referring victims to support services).

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<sup>2251</sup> Physicians for Human Rights ('PHR'), 'Virginity and Hymen Testing: No Factual, Scientific, or Medical Basis' (undated) ('PHR, Virginity and Hymen Testing'), p. 1.

<sup>2252</sup> *See e.g.*, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 62; WHO, UN Women, OHCHR, 'Eliminating Virginity Testing: An Interagency Statement' (2018) ('WHO, UN Women, OHCHR, Eliminating Virginity Testing').

<sup>2253</sup> WHO, UN Women, OHCHR, 'Eliminating Virginity Testing: An Interagency Statement' (2018), p. 10. *See also*, CPC, Article 241.

